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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. ~~672~~ 31

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED FEBRUARY 2, 1929

CERTIORARI GRANTED MARCH 5, 1929

(33,981)

(33,981)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 672

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 21, 1929

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[fol. 1] [Caption omitted]

[fol. 2]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A LAW COURT

Law. No. 70766

GERTRUDE L. COOLEY, Plaintiff,

vs.

DR. EDWARD J. GUNNING, Defendant

DECLARATION—Filed Oct. 22, 1925

First Count

The plaintiff, Gertrude L. Cooley, formerly Gertrude L. Chase, sues the defendant, Dr. Edward J. Gunning, for that on to wit, the 23rd day of October, 1922, and for a long time prior thereto, the defendant was engaged in the practice of *the* medicine and surgery in the District of Columbia; and for that on the day and year aforesaid and for some time prior thereto the plaintiff was ill and required the services and attention of a physician; and that prior to the happening of the grievances hereinafter set forth, the plaintiff had made several visits for professional attention to the office of defendant, that on the day aforementioned the said defendant was engaged by plaintiff and undertook to make an examination and diagnosis of her condition; and for that the defendant in the course of his employment as aforesaid on to wit, the 23rd day of October, 1922, the said defendant undertook to treat the plaintiff; and that it then and there became and was the duty of the said defendant to exercise reasonable care and prudence in the said examination and treatment so as to avoid injuring her, yet, notwithstanding the duty of the said defendant in the premises, he did not use such care and prudence, but negligently and carelessly injected and discharged into the ears and internal organs of the said plaintiff a solution which was harmful, dangerous and destructive of the tissues and drums of

the ears and which was not a solution used by physicians and surgeons in the exercise of such care as is usually used [fol. 3] by practicing physicians and surgeons in this locality, to wit, in the District of Columbia, in the treatment of the ears by reason of which negligence and carelessness on the part of the defendant the plaintiff suffered great pain and mental anguish and will in the future continue so to suffer and is permanently maimed, disfigured and wounded and the ear-drums destroyed and such disfigurement is of a permanent nature.

And by reason of the injuries of the said plaintiff she has been unable to follow her usual work and occupation, and has thus been deprived of her earnings which she otherwise would have made, and has expended large sums of money and incurred obligations to a large sum in an endeavor to be cured of her injuries aforesaid.

Wherefore the plaintiff brings this suit and claims damages in the sum of twenty-five thousand dollars ($25,000.00), besides costs.

Second Count

The plaintiff, Gertrude L. Cooley, formerly Gertrude L. Chase, sues the defendant, Dr. Edward J. Gunning, for that on to wit the 23rd day of October, 1922, and for a long time prior thereto and since the said defendant held himself out to this plaintiff, and to the general public as a physician and surgeon, and as such was engaged, and so had been engaged in the said practice of medicine and surgery, and held himself out to the plaintiff, and to the general public, as being skilled in the practice of medicine and surgery, and as possessing such reasonable degree of skill and experience, in medicine and surgery, as is ordinarily possessed by others of the same profession so holding themselves to the public in the practice of medicine and surgery. And the plaintiff avers that upon the day and year aforesaid she consulted the said defendant, she was treated by the said defendant for certain human ailments in and about her throat, ears and body, and the said defendant undertook and agreed, and for a valuable consideration, to properly treat the said plaintiff for her said illness, and to give to the said plaintiff proper treatment,

care and attention therefor, and represented to the plaintiff that it was necessary, to relieve the said plaintiff of [fol. 4] her said physical ailments, to drop a solution known as sweet oil into her ears.

And the plaintiff avers that notwithstanding the promises and undertaking of the said defendant as aforesaid, the said defendant did not properly treat the said plaintiff for her said ailments as aforesaid, and did not properly possess and exercise that degree of skill and learning, which is ordinarily possessed and exercised by others in the same profession, so holding themselves out to the general public as did the defendant in this case in this that the said defendant negligently injected and discharged into the ears and internal organs of the said plaintiff a solution which was not sweet oil but was a solution which was harmful, dangerous and destructive of the tissues and drums of the ears, and by reason thereof the said plaintiff was seriously, dangerously and permanently injured in and about her ears and the internal structures of the ears destroyed, and therefrom suffered great physical pain and mental anguish and will in the future suffer physical pain and mental anguish and is permanently injured, disabled and scarred and disfigured in and about the ears and is permanently deaf in both of said ears.

The plaintiff, by reason of the premises has been unable to follow her regular and usual employment and has thus been deprived of her earnings which she would otherwise have had, and has expended large sums of money and incurred obligations to a large extent in endeavoring to become cured of her hurts and injuries as aforesaid.

Wherefore the plaintiff brings this suit and claims damages in the sum of Twenty-five thousand dollars ($25,000.00), besides costs.

Ralph A. Cusick, Attorney for Plaintiff.

In Supreme Court of District of Columbia

Plea—Filed Nov. 25, 1925

* * * * * * *

Now comes the defendant, by his attorneys, Messrs. Minor, Gatley & Rowland, and for plea to the declaration

herein filed, and each count thereof, says: He admits that [fol. 5] on October 23, 1922, and for a long time prior thereto, he was engaged in the practice of medicine in the District of Columbia. He denies that said plaintiff visited him several times for professional attention prior to said date, and says that the only treatment given by him to plaintiff was on October 20, 1922, at which time he treated her professionally by placing a drop or two of pure mineral oil in the external ear of plaintiff. He denies each and every the other allegations of said declaration, and each count thereof.

And for further plea to said declaration, and to each and every count thereof, the defendant says that said plaintiff ought not to have or maintain her said supposed cause of action because the same did not accrue to the said plaintiff at any time within three years next before the commencement of this suit.

Minor, Gatley & Rowland, Attorneys for Defendant.

In Supreme Court of District of Columbia

Memoranda

December 8, 1925.—Joinder of issue, notice of trial and note of issue filed.

March 15, 1927.—Name of plaintiff changed to Stewart on record; jury sworn and respited from day to day, to March 22, 1927.

March 22, 1927.—Verdict for plaintiff for $10,000.00.

In Supreme Court of District of Columbia

Memorandum on Submission After Hearing of the Defendant's Motion for a New Trial—Filed on March 25, as Amended April 9, 1927.

While the defendant in this case stands on all of the grounds alleged in his original motion for a new trial, at the oral argument much stress was laid upon the additional

ground alleged in the amendment, permitted on April 9, 1927, which alleges, as a ground for a new trial, newly discovered evidence. The motion has been very earnestly pressed by counsel for the defendant, and as earnestly resisted by counsel for the plaintiff With respect to the additional ground referred to, that of newly discovered evidence, it was supported, on behalf of the defendant, by four affidavits, one of them being by the counsel for the [fol. 6] defendant who tried the case. Counter-affidavits were filed on behalf of the plaintiff, twenty-five in number. These overwhelmingly contradict the affidavits presented by the defendant, excepting the affidavit of Mr. Gatley, of counsel for the defendant, which states the circumstances which led him to add the ground of newly discovered evidence to the motion to amend the original motion. The Court has given careful consideration to the contentions made on behalf of the defendant and those in opposition, and has considered the authorities cited, pro and con. The Court would not be justified in setting out at length the grounds for the conclusion reached.

The case was vigorously prosecuted, and as vigorously defended, and various objections, which constitute some of the grounds in support of the motion, were argued and ruled upon during the trial. The Court has not been convinced that any error was committed during the trial of the case. There was but one exception reserved to the general charge to the jury, and that one taken by the defendant. Examining so much of the charge as thus excepted to, the Court, in its opinion, perceives no ground for that exception. The matter upon which the exception is based, is dealt with beginning on page 373 of the stenographic transcript of the charge.

The Court has given a good deal of time to the consideration of the case, realizing, of course, its importance to the plaintiff and to the defendant, a professional man, a doctor, who is charged with negligence to the plaintiff, resulting in a serious impairment of her hearing. The jury found the negligence and returned its verdict. The Court is unable to say that that verdict was excessive, although it is a very substantial verdict. The plaintiff is a young married woman, and there was evidence that the injury is incurable.

The conclusion of the matter is that the motion for a new trial should be overruled.

And it is so ordered.

F. L. Siddons, Justice.

June 15, 1927.

[fol. 7] Supreme Court of the District of Columbia

Judgment—June 15, 1926

Session resumed pursuant to adjournment, Mr. Justice Siddons, presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon, the amended motion for a new trial being considered, after argument thereon and submission to the Court heretofore, it is ordered that said motion be, and the same is hereby, overruled and judgment on verdict ordered.

Wherefore it is considered that the plaintiff recover herein of said defendant the sum of Ten Thousand ($10,000) Dollars, with interest thereon from this date, together with her costs of suit to be taxed by the Clerk, and have execution thereof.

In Supreme Court of District of Columbia

Memoranda

June 16, 1927.—Appeal noted in open court and penalty of undertaking (supersedeas) and undertaking for costs fixed.

June 28, 1927.—Time to file Bill of Exceptions extended to August 1, 1927.

June 29, 1927.—Undertaking for costs approved and filed.

July 22, 1927.—Bill of Exceptions (proposed) filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENTS OF ERROR—Filed Jul. 22, 1927

* * * * * * *

1. The Court erred in permitting the witness Dr. Grover Bache Gill to answer the following question:

"Is there any substance or liquid which, put in the ear would destroy the tissue and destroy the ear-drum?"

[fol. 8] 2. The Court erred in permitting the witness Dr. Grover Bache Gill to answer the hypothetical question put to him as follows:

"Doctor, assume that Miss Cooley was about 22 years of age, that she had never complained of any pain or trouble with her ear; that she had had none of the diseases of childhood which had resulted in that acute condition of the ear, pain or a discharge therefrom and had had no complaint, or had made no complaint of inability to hear, or of any defect in her hearing; that on this 25th of October, 1922, she attended a doctor and that before he began a treatment, which was a treatment to her throat and nose, she told him that at that moment she felt as if there were some wax in her ear, it was stopped up a little and asked him to look at her ear; that he looked at it through an instrument and said her ear was all right, but that he would put a little mineral oil to loosen the wax; that he thereupon took with a dropper from a bottle of liquid and put it in her ear and immediately she suffered the sensations of agony and pain and roaring sounds and sounds of cannon, and that he persuaded her finally in a short time, to permit him to insert some liquid in her left ear, and that she knocked his arm away after he had begun that insertion, and she experienced the same sensations in the left ear. That she became semi-conscious as a result of the pain and the noise that she was hearing and was required to lie down for a period of at least two or three hours and was then carried to a taxicab, was taken in a taxicab to her home and carried from the taxicab to her room and put to bed where she remained for several days. Assume that at no time since then did she have any abscesses of the ear or disease of the ears that resulted in the

discharge of pus, and assume that from that time until shortly before the date of your examination that she had been attending the doctors, who had given her treatment in the form of something to relieve her pain; that her condition improved somewhat; that the deafness which she had first experienced totally for a while got better so that she could hear better, and the pains did not continue to be so insistent, but that at times they would not be as severe, but that even to this day she has sounds in that ear and assume that on the day of your examination you found her ear to be in the condition that you described, what, in your opinion, would be the cause of that?"

[fol. 9] 3. The Court erred in overruling the defendant's motion to strike out the answer of the witness Dr. Grover Bache Gill, to the hypothetical question.

4. The Court erred in overruling the motion to strike out the answer of the witness, Dr. Grover Bache Gill, to the following question:

Q. "Now, Doctor, you said yesterday in your testimony that upon your examination you found that her 8th nerve was functioning properly, as well as it could be expected under the circumstances. Will you tell the Court and jury what part the 8th nerve has to do with the ear, and what you referred to in that?"

A. "The 8th nerve is a nerve of hearing, and it is a nerve that transmits the sound. After it is received by the inner ear to the brain, it transmits the impulse. As a rule, if we have a case with a normal 8th nerve hearing, we usually can say without a doubt that the inner ear is perfectly all right, that there is no disease of the inner ear."

5. The Court erred in refusing to admit in evidence the record card and report of Dr. Floyd McC. J. Allen, marked for purposes of identification "Allen Cross Examination Exhibits 1 and 2."

6. The Court erred in refusing to receive in evidence the memorandum made by the defendant at the time of his examination of the plaintiff on October 13, 1922.

7. The Court erred in refusing to admit in evidence the record of the history of plaintiff's case, made by the defendant on October 20, 1922.

8. The Court erred in permitting the witness Jonas M. Smith to answer the following question:

"I will ask you whether or not on that occasion Dr. Patten directed the attention of Dr. Allen in his examination of Mrs. Stewart's ears and made the statement in the presence of Dr. Allen, as Dr. Allen was making his examination, words to this effect: 'You see that the right eardrum is practically all gone and that a part of the left is gone,' and Dr. Allen in reply said: 'Yes, I see.'"

9. The Court erred in overruling the defendant's motion to direct a jury to return a verdict in favor of the deefndant.

10. The Court erred in refusing to grant instruction numbered I, requested on behalf of the defendant.

[fol. 10] 11. The Court erred in refusing to grant instruction numbered III, requested on behalf of the defendant.

12. The Court erred in its charge to the jury.

Minor, Gatley & Rowland, Attorneys for Defendant.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM

September 1, 1927.—Bill of Exceptions submitted.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER MAKING BILL OF EXCEPTIONS PART OF RECORD

September 12th, 1927.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * * * *

The Court having this day signed the Bill of Exceptions heretofore submitted, as of the time of the noting thereof at the trial, now hereby orders the same of record, nunc pro tunc.

In Supreme Court of District of Columbia

Designation of Record—Filed Jul. 2, 1927

* * * * * * *

The Clerk of the Court will please prepare transcript of record on appeal in the above case, and include therein the following:

1. Declaration.
2. Defendant's plea.
3. Memorandum: Joinder Note of Issue and Notice of Trial filed.
4. Memorandum: March 15, 1927, name of plaintiff changed to Stewart on record; jury sworn and respited from day to day to March 22, 1927.
5. Verdict of jury.
6. June 15, 1927, motion for new trial overruled and judgment.
7. June 15, 1927, Opinion of Court.
8. June 16, 1927, Memorandum: Appeal in open Court and penalty of undertaking on appeal fixed.

[fol. 11] 9. Memorandum: June 28, 1927, time to file Bill of Exceptions extended to August 1, 1927.

10. June 29, 1927, Memeorandum: Undertaking on Appeal approved and filed.
11. This designation.

Minor, Gatley & Rowland, Attorneys for Defendant.

Received copy of the foregoing designation this 2nd day of July, 1927.

A. L. Newmeyer, Attorney for Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

At Law. No. 70766

GERTRUDE L. COOLEY, Plaintiff,

vs.

EDWARD J. GUNNING, Defendant.

Bill of Exceptions

CAPTION

Be it remembered, That at the trial of the above entitled cause the plaintiff, in order to maintain the issues on her part joined, offered the testimony of herself and the following witnesses:

MRS. MARTHA VIOLA BRILL, being called as a witness for and on behalf of the plaintiff, testified as follows:

I am acquainted with the plaintiff, having known her since 1919. In 1920 she married my brother, James E. Chase. I recall seeing her on several occasions in October, 1922. During the time I have known her, her hearing was absolutely perfect. She lived at my mother's house for a while. I do not ever remember her being sick in any way and I never heard her complain of suffering with her ears. On October 21, 1922, Saturday, my birthday, I met the plaintiff and went to the Peoples Drug Stone on G Street, near Eleventh, to buy some perfume. After we left the drug store we went to Dr. Gunning's office on Massachusetts Avenue, near the Ascension Church. The plaintiff went into the doctor's office and was there 15 or 20 minutes, maybe longer. On that day her voice was a little husky. She showed no evidence of any trouble with her hearing or with her ears that day. I next saw her in November, 1922, when she came to my house. Immediately upon coming there she began to cry, she was very nervous and looked as though she had been under a terrible strain. I had to talk so loud in order that she could hear what I was asking her. I had to get right up to her so she could know [fol. 13] what I was saying. I had never had that expe-

rience with her before that time. I saw her about every 10 days after that, but could see very little improvement in her condition, I had to talk just as loud. When I would be telling her anything she would hold her hands to the back of her ears as though she had a terrible noise or headache. I have seen her frequently up to this time. I think her hearing is a little better. She can understand you if you talk right to her, but if she gets a little bit away she can't, and she becomes very nervous when two of us are in the room talking and she is not close enough to understand what we are saying. The nervousness is very apparent.

Whereupon BROOKS C. EASTERLING, being called as a witness for the plaintiff, testified as follows:

I am a sergeant in the United States Marine Corps, stationed at headquarters in the Navy Building. I know the plaintiff and have known her since the summer of 1922. In October, 1922, she came to the place where I was living, 1201 Carroll Street, Northwest, about the time I was getting ready for dinner. She was very pale and apparently sick and with a bleeding at the nose. She remained there for approximately half an hour, resting on a couch, when I called a taxi and took her home. Her hearing was good as far as I know. I never noticed anything wrong with it and never heard her complain of any trouble with her ears or hearing up to that time. A day or two later I had a dinner engagement with her and I was to meet her on Massachusetts Avenue at 6 or 6:30 in the evening at the doctor's who was treating her. When I got there I did not see her, so I waited in the lobby for possibly 15 or 20 minutes, when I went in. As I got to the door of the doctor's office I heard a scream and at the same time someone came and opened the door and the doctor came to the door and asked me if I was the one that was there for this lady. I told him I was, so he invited me in and I went into his office, where she was lying on a couch, apparently in a semi-conscious condition. I asked her what the trouble was and she did not seem to understand me and I asked the doctor what was the trouble, or what he had done to make [fol. 14] that effect, and he said nothing, that he had just

given her a small treatment of oil and she had suffered a slight shock and would be all right shortly. About 10 minutes later I asked her how she felt and the only answer I got was "My head, my head." She remained on the couch possibly and hour, when I suggested she be taken off the couch and placed in a more comfortable place and she was taken over to the doctor's bedroom and placed in bed. She was helpless. She had to be picked up bodily. I picked her up, carried her over and placed her in the bed and she was still groaning and moaning with her head; she could not balance herself, she could not walk. She remained there until about 11 o'clock at night, was not much better and was still unable to walk, so I called a taxi, picked her up, carried her down to the taxi and took her home. She was helpless when we got her home. She was taken out of the taxi into the house by the chauffeur, who carried her, and she was placed in bed. I think I have seen her once since then, with the exception of the time that I saw her in her attorney's office. I met her on the street once. She was complaining of her ears, of being deaf in one ear. I do not think I would recognize the doctor if I saw him.

On cross-examination the witness testified he first met the plaintiff in the summer of 1922 and saw her about once in every two weeks up until October, the time of this accident, and did not see her after that except one casual meeting on the street. When I was in the doctor's office, I saw the doctor, his wife and the plaintiff. The plaintiff was nauseated, but I would not be positive that she really vomited so much, she was trying to. The doctor's wife was looking after her when she was on the bed.

Whereupon Mrs. Esther Clokey, called as a witness on behalf of the plaintiff, testified as follows:

I am a sister of the plaintiff and in October, 1922, I was living with my mother at 718 7th Street, Northeast. On the 23rd day of October, 1922, I saw the plaintiff in the morning before I left for the office. She was all right, did not complain of any pain or suffering with her ears. I had been associated with her through childhood and never saw [fol. 15] any indication at any time that she had anything

out of the way with her ears or hearing. She never suffered with an abscess in the ear or running ear or anything of that sort, her hearing was normal. I saw my sister when she came home that night after dinner. She seemed apparently all right, with the exception of a nose bleed; her hearing was all right. A day or two later than that, it must have been after 9 o'clock in the evening, in response to a ringing of the door bell I went to the door and my sister was down at the curb by a taxicab. She was laying back in the cab, as white as a ghost, and I thought not even breathing. The chauffeur carried her into the house, up to the front bedroom ,and we laid her on the bed. Mr. Easterling brought her home and he handed either to my mother or myself a package containing some little pills. Later I called up Dr. Gunning's office and asked him what had happened to my sister. He said nothing out of the way, she was extremely nervous after a treatment he had given her, but just keep her quiet for a few days and she would be all right. I slept in bed with my sister that night and she moaned and groaned and tossed and held her head and carried on terribly. The next day her condition was the same, if not worse. Dr. Gunning never came to the house to see her. She was in bed from Wednesday until Friday, when she came down stairs to eat her dinner. She would cry and scream when the telephone would ring, when we played the Victrola. She would hear us talking on the phone and she would hold her ears and cry. The same thing would happen with respect to the Victrola or the door bell. When I was speaking to her or the other members of the family, she would cry constantly, would not answer us and we would always have to repeat, and if you hollered she would almost get hysterical. On Friday night my brother and sister took her to a specialist. I saw her every day after that and she had been to the doctor's office a good many times before we could see any signs of improvement. The Doctor was Dr. Patten. It must have been a month or more before we saw any improvement, then she seemed more cheerful and at times could hear better. I have seen her frequently since that time and up to a few weeks ago she seemed about the same, no great improvement, but a few weeks ago she had a setback and after having some [fol. 16] treatments she seemed again like she was ahead of

that. At times she could hear better than others. Prior to October, 1922, her hearing was perfectly all right.

Whereupon MRS. HARRIET R. COOLEY, being called as a witness for the plaintiff, testified as follows:

I am the mother of the plaintiff. Prior to October, 1922, there was nothing wrong with her hearing as a child or as a girl or at any time. She never had any abscesses in her ears or running ears or anything of that sort. She never had any medical treatment for any disease of the ear or injury to the ear. I remember an incident in October, 1922, on a Wednesday evening, quite late after dinner, when I went to the door and Mr. Easterling, the gentl-man that she called to come over to the office, was standing at the door. My daughter was in the back of a taxicab. She looked to me like she was dead. She could not speak to me and she asked the chauffer if he would carry her into the house and he brought her in and laid her on the bed. She appeared unconscious and to be suffering terribly. The next morning I called Dr. Gunning and asked him if he was coming over. He said no, it is not worth while; that she had a terrible roaring in her head which would wear off, and that he would send some medicine through the mail, which he never did. She remained in bed until Friday. We had to talk to her very loud, she could not hear in an ordinary conversation. Friday evening we called Dr. Patten. Dr. Gunning did not suggest that we call Dr. Patten or any doctor or that she needed a doctor; my eldest daughter suggested Dr. Patten. I accompanied her to Dr. Patten's office on the Friday evening she was taken there by my eldest daughter Mrs. Logan Morris and Mr. Morris. Dr. Patten just sat for a while and looked at her in amazement, as if he were puzzled at first, and then finally he took her into his office for examination. I also accompanied her on a few other occasions after that to Dr. Patten's office. I cannot recall how often she saw Dr. Patten. She has been going to his office twice a week until just within two or three months ago, I think it was, since the doctor got so he was not able to give her treatments.

On cross-examination the witness testified her daughter was 27 years of age. She does not think she had the [fol. 17] measles when she was a child; some of her children did, but whether the plaintiff had them or not she cannot recall, because witness had seven children. She never had any trouble with her nose or teeth prior to this time. Plaintiff told her afterwards she had called Mr. Easterling to come over to the doctor's office and bring her home; my daughter never had any dizzy spells before this that I know of; she lived with me all that summer prior to October, 1922.

Whereupon Mrs. Mildred C. Morris, being called as a witness for the plaintiff, testified as follows:

I am a sister of the plaintiff. During childhood we were always together and I lived at home until 1919, when I was married. She never had any trouble with her ears until after she went to the doctor, her hearing was perfect. I saw her on the 26th of October, 1922, at my mother's house. The day before, I am quite sure, is my husband's birthday, we had been out celebrating and that is the reason my mother did not call me that night. She seemed to be suffering terribly and apparently could not hear me. I went with her to Dr. Patten's office. It was my suggestion. He examined her ears and gave her some kind of treatment. I stood there and witnessed it. She would suffer and moan and he would have to go very slowly. I went with her every day for several weeks, and then for a long time several times a week. I went with her a number of times to Dr. Patten's office for treatment. She could hear just a little bit better after that. She can hear a little better now, but she cannot hear anything like she could before she went to Dr. Gunning for treatment.

Whereupon the Plaintiff, being sworn in her own behalf, testified as follows:

I reside with my husband, Harvey J. Stewart, whom I married December, 1925; I had previously been married to James E. Chase in April, 1920, and I obtained a divorce from him in Richmond, Va., for non-support the first part

of 1925. In October, 1922, I was living with my mother at 718 7th Street, Northeast. Prior to the 25th of October, 1922, I never had any difficulty in hearing and had never [fol. 18] had any disease or injury to my ear or an abscess in my ear or running ear. I do not ever remember as a child having any of those conditions. I first consulted Dr. Gunning on Saturday, October 21, 1922, at his office, 1210 Massachusetts Avenue. I had a sore throat and I was getting a little husky. I had vocal lessons and did not want anything to happen to my throat. He sprayed my throat. I paid him his charge which was either one or two dollars, at that time. He told me to come back on Monday evening and I went back a little after 5 o'clock. He gave me a treatment in my nose and said that mouth breathing had caused my sore throat and there was something wrong with my nose and he would treat it. He gave me a treatment that hurt my nose and caused it to bleed. I paid him for that visit. When I left his office, I went to 1241 L Street, which was right around the corner, where Mr. Easterling boarded with Mrs. de Burn, and sat down in her living room. I stayed there a little while and Mr. Easterling took me home in a cab. I had an appointment with Dr. Gunning the next Wednesday evening and went to his office. I was the first patient he saw. It was a little after 5 o'clock. I had an appointment with Mr. Easterling to go to dinner that evening and he was to meet me at the doctor's. I had to wait a little while and the doctor came to the door of the waiting room and told me to come in his office. I said to him: "You hurt me Monday evening. What on earth did you do?" He said: "Oh, I just removed a pair of adenoids." I said: "What is the idea of such a thing?" And he replied: "That is nothing. Any growth in your nose is an adenoid." I told him I had had my adenoids removed in September, 1914, and he said they grow back. I said: "You know my throat still hurts and I think I have a little cold or wax or something in my right ear." He looked in my ear and said: "There is nothing wrong with your ear at all." "But, I said, it feels you know, like there might be wax in it." He said: "Let me drop a little mineral oil in there." So after he dropped that mineral oil I could not explain to any one the horror of it. He put a little silver

instrument in my ear, that they look down in your ear with, and used a dropper that he got from a little bottle on the cabinet. There were several of those bottles sitting there. They were little white bottles, you could see what was in [fol. 19] them. There were several, at least three, I know. I don't remember whether they were labelled or not. Everything in the bottles was white or very nearly white; you could see through the bottles. The dropper was lying on the cabinet besides the bottles. The ear I told him about the wax was my right ear. He inserted the dropper in my right ear, and the very minute it went in the pain was horrible and I became dizzy, the room started going around and around. I held on to the arms of the chair and I told him: "Something has happened, you can't realize what you have done." He said: "Oh, nothing is wrong, I assure you nothing is wrong." I said: "You can't realize what the noise is that I hear in my head and the dizziness and this room is going around." He said: "There is absolutely nothing wrong, let me put some in your left ear," and he did, and as he did it I felt the same sensation and I struck his arm away. It was terrible. No one knows what I went through. And he knew something had happened, he acted like he was wild; he did not know what to do for me and I was begging him to do something for me and he just couldn't do a thing. He said it would be all right. I heard a roaring noise. I don't know whether it was cannon shots or gun shots or what, but the noises were terrible. I could not describe to anyone what they were. Immediately I became ill. I really lost control of my whole body. I didn't have any feeling and it seems that the doctor must have laid me on the table and that is about all I can remember except the noises in my head. I believe I do remember arriving home and seeing my mother that evening, but I could not tell you how I got there. It was a couple of months before I could begin to hear any noise, as for instance riding on the street car to be able to hear the street car bell or the telephone ring. I was totally deaf to all sounds. I did not see Dr. Gunning after that nor have any conversation with him. Dr. Gunning never recommended to me that I see Dr. Patten. Mrs. Brill accompanied me to Dr. Gunning's office on the preceding Saturday, my first visit. I did not know Dr. Gunning before this first visit. On

Friday night, after I saw Dr. Gunning on Wednesday, there had been no improvement in my condition and I went to see Dr. Patten with my sister, Mrs. Morris, and her husband [fol. 20] and my mother. Mrs. Morris suggested Dr. Patten. Dr. Patten gave me a treatment. It was very painful. I went to see Dr. Patten every day for very nearly two months, and after that I went three times a week and now I go twice a week. Dr. Patten continued to treat me until October, 1926, and then he was away and has not returned and later I went to Dr. Morgan, whose office adjoined Dr. Patten's, and he has been giving me treatments twice a week. Last year I was examined by a Dr. Allen, selected by Dr. Gunning, in Dr. Patten's office. My mother, Mr. Cusick and Mr. Smith were present. The examination was very painful. Dr. Gunning was not present. Within the past month I have been examined at your request by another physician; the examination was very painful. I am very nervous every time I get a treatment. At the present time I cannot hear at all with my right ear and in that ear I always have a terrible noise, a roaring noise that has never ceased, and I hear what I hear with my left ear. On rainy, cloudy days my head feels clogged up and sounds are not as clear as they are when it is clear. Dr. Patten agreed to accept $2.00 a visit. He is a specialist. In October, 1922, I was temporarily employed at the Association against the Eighteenth Amendment as a typist. I had been employed in the Government as a stenographer, but not right up until the time I went with the Association. I had not been working. My earnings as a stenographer with the Government were $1,440 a year, and with the Association I made $20 a week. At the time Dr. Gunning gave me the final treatment, no one was present but myself and the doctor. No nurse was in the room nor was Mrs. Gunning. On the night of the final treatment I remember a woman moving around in the bedroom when I was lying on the bed. Since this occurrence my nerves are shattered and before this I never knew what it was to have nerves.

On cross-examination the witness testified that she had never received a bill from Dr. Gunning; she had not experienced any dizziness or buzzing in her ears before she went into the doctor's office. When the maid admitted her,

she went into the waiting room on the other side of the hall from the office. No one was there, but when she went into the doctor's office some one else had come in, but she does not remember how many people were there. No one [fol. 21] in the waiting room rang for a maid to get her a glass of water. She did not ask a patient in the waiting room to get her a glass of water. She told no patient in the waiting room that she felt nauseated, nor did she tell her that she had buzzing in her ears and dizziness. She did not speak to a person who was in the room. She did not tell her that she felt very badly, nor did this person request the doctor to see the plaintiff first. This person did not call the doctor's wife and ask her to see the doctor and request him to see the plaintiff first because she was feeling so badly.

Whereupon, Miss Spitzer was called into the court room and the plaintiff said: "If I remember correctly that is the lady who was in the doctor's bedroom. I do not remember seeing her in the waiting room before I went into the doctor's office." She does not remember going out of the doctor's office at all, nor leaving his office. She did not walk from his office into the bedroom, does not remember Mrs. Gunning offering her gingerale or lemonade in the bedroom. She did not tell this person in the waiting room that she had had these dizzy spells before. She did not speak to the lady in the room. She was not nauseated in the waiting room, was not nauseated until after her treatment. She consulted Dr. Hopkins in Richmond after she had been treated by Dr. Gunning, and several summers ago since Dr. Gunning's treatment she consulted Dr. Bradley, a dentist, and Dr. Philip Roy and Dr. Bennett.

Interrogated by the Court, she further testified that there was no further examination made by Dr. Gunning of either her right ear or left ear, between the times he applied the liquid to the right ear before applying it to her left ear.

She first consulted a lawyer about this case in October, 1925. Thereupon it was admitted without objection that the calendar for October 1922 showed that October 21, 1922, was a Saturday; October 23, 1922 was a Monday; and October 25, 1922 was a Wednesday.

Whereupon Dr. Grover Bache Gill, a witness called for and on behalf of the plaintiff, testified as follows:

I am a practicing physician and surgeon in the District of Columbia, specializing in the particular branch of ear, [fol. 22] nose and throat. I graduated at the Medical College of Virginia in 1915; had a post graduate course in France in 1918, a post graduate course in New York in 1920 and 1921, and in St. Louis in 1922, and in Vienna and Brussels in 1925. I made an examination of the plaintiff on February 28, 1927.

Over the objections of the defendant, the witness testified:

I gave her an examination, the same as any one. I first asked her what was the trouble. She said with her ears and I examined her ears, nose and throat, and after I was probably about two-thirds through with the examination, or after I was through, then this subject was brought up about having thought she had, or had had, acid put in her ears. I did not know anything about the case up to that time. I examined her ears with the otoscope, looked at the drums. She complained, as I have it on my history card, complained of acid being put in her ear in 1922. She now complains of deafness, and I looked at the eardrums, and the one on the right side is practically all gone. The one on the left side, the lower segment about, I should say, between one-third and one-half is gone, and I found that she had 20/60ths hearing in the right ear and 20/50ths in the left ear, 20/20ths being normal. That was the conversational voice. I used the tuning forks, and I found that her 8th nerve was practically normal, was functioning properly, as much as you would expect to find in these cases, in difficulties of this sort.

The ear from the drum out is known as the canal. On the outer ear, all between the drum and the wall of the inner ear is known as the inner ear, and from that on inward to the end of the petrous temporal bone is known as the internal ear. There are three major sections. The middle ear of this patient was not normal. Men have claimed to have replaced the drums in ears, but I have never seen one yet, especially where as much of the eardrum is destroyed as in this case. In a very small perforation it is possible; not in a case of this sort. It was not

a small perforation but a large perforation on one side and you would say almost the absence of a drum on one [fol. 23] side. The drum of the ear acts as a transmitter of sound from the outer wall to the inner ear. The plaintiff is deaf and we presume that that condition was the cause of it.

Asked the question: "Doctor, what in your opinion would cause a condition of the eardrums of a patient, or in a patient similar to what you discovered in this case," the witness answered: "Why, it could be a good many things cause it. You could take a prolonged abscess of the ear following diseases of childhood, such as scarlet fever, which is one of the most destructive forms of the middle ear; infection, tuberculosis of the middle ear and syphillis of the middle ear, and typhoid fever, mumps, most any exanthema would cause those conditions." Assuming that any of these acute diseases of childhood had affected the eardrum, there would be a discharge in the ear, a pain, possibly fever. Asked how long it would take for a condition of that kind to result in the destruction of the eardrum to the extent existing in this case, the witness testified it would depend entirely upon the resistance of the patient in the first place and the severity of the infection. We have some diseases that will destroy an eardrum almost in a short period of time, but I would say that, as a general rule, it would take some considerable time, anywhere around a month or two months and from that on up to a year, depending on the severity of the infection. Any of them would destroy it within a shorter time than a month if it were severe enough. In the event that a disease should cause the destruction of the ear drums, it would usually be followed by a discharge from the ear and pain before the ear rupture.

Asked to describe to the jury about the discharge in the ear and the pain and the ear rupture, the witness stated: "It is known as an acute inflammation of the middle ear, or middle ear abscess—usually comes on with a pain. In tuberculosis it is possible for the drum to rupture without any pain preceding it, but that is very unusual. There is usually quite a bit of discharge over a period of time. It comes on at night, and during the day the ear has to be cleaned, usually. The discharge is pus." There are

other things that would cause a destruction of the eardrum besides diseases, such as an accident; a sudden blow to the ear would rupture the eardrum, and of course anything that would destroy tissue would do it.

[fol. 24] Whereupon the witness was asked the following question: "Is there any substance or liquid which, put in the ear, would destroy the tissue and destroy the eardrum?" To which question the defendant objected on the ground that it was not the subject of expert testimony, but the Court overruled said objection, to which exception was duly noted. Thereupon the witness answered as follows: "Yes, I imagine an acid—I never saw a case of that kind; I never saw acid put in an eardrum, but I imagine it would." By "imagine" I mean it is my opinion. Asked if there was any liquid that is used in the ear to loosen wax, the witness testified: "Yes; we use oils of different kinds, mineral oils, sweet oils, peroxide of hydrogen, and I guess probably other men use other things. That is all I use as a rule." The liquids I have mentioned are not acids and not tissue-destroying.

"Q. Can you tell us, in your opinion, what the effect would be to a patient of having an acid put into her ear?"

Mr. Gately: I object to that question as incompetent and immaterial, and further on the ground that there has been no foundation laid for any such hypothetical question.

The Court: I will let it go in, but subject to your right to strike later.

"A. No, I could not, hardly, except that it would be a terrible thing. I imagine you would get every symptom under the sun. I do not imagine anything on earth worse that could happen to one. That is as near as I could tell you."

Mineral oil, if pure, is clear, the color of water.

Asked what Meniere's disease is, the witness stated it is a disease, I think, as nearly as I can remember, very unusual. I have never seen but one case and that was only supposedly Meniere's disease, characterized by hemorrhages into the internal ear. The symptoms are cessation of hearing in either one or both ears, depending whether it is in both sides or only one, nausea, vomiting and vertigo. The symptoms are manifested instantly, as a rule, when the

hemorrhage takes place in the inner ear. It is a disease of the inner ear.

Thereupon, the defendant, by his counsel, moved to strike out all the testimony of the witness with the exception of [fol. 25] the last hypothetical question that was asked him, on the ground that his testimony relates to an examination made five years after this occurrence, nearly two years after this suit was filed, in the absence of any knowledge on the part of the witness as to what the conditions were existent at the time of the alleged treatment in this case, and in giving his testimony he has testified as to certain subjective symptoms, made known to him at the time of his examination, and that such testimony is highly prejudicial to the interests of the defendant in this case and is incompetent and immaterial to any issue involved in the case.

"Doctor, in your testimony yesterday you mentioned something with respect to what Mrs. Stewart had told you in connection with her condition. I want you, in your answer to the question I am about to ask you, to eliminate from your mind anything as to what she had told you, and base your answer upon your own examination of her condition, assuming the facts that are in this question I am about to put to you and not upon anything she told you.

"Doctor, assume that Miss Cooley was about 22 years of age, that she had never complained of any pain or trouble with her ear; that she had had none of the diseases of childhood which had resulted in that acute condition of the ear, pain or discharge therefrom and had had no complaint, or had made no complaint of inability to hear, or of any defect in her hearing; that on this 25th of October, 1922, she attended a doctor and that before he began a treatment, which was a treatment to her throat and nose, she told him that at that moment she felt as if there were some wax in her ear, it was stopped up a little and asked him to look at the ear; that he looked at it through an instrument and said her ear was all right, but that he would put in a little mineral oil to loosen the wax; that he thereupon took with a dropper from a bottle a liquid and put it in her ear and immediately she suffered the sensations of agony and pain and roaring sounds and sounds of cannon, and that he persuaded her finally, in a short time, to permit him to insert some liquid in her left ear, and that she knocked his arm away after he

had begun that insertion, and she experienced the same sen- [fol. 26] sations in the left ear. That she became semi-conscious as a result of the pain and the noise that she was hearing and was required to lie down for a period of at least two or three hours and was then carried to a taxicab, was taken in a taxicab to her home and carried from the taxicab to her room and put to bed where she remained for several days. Assume that at no time since then did she have any abscesses of the ears, or diseases of the ears that resulted in the discharge of pus, and assume that from that time until shortly before the date of your examination that she had been attending the doctors, who had given her treatment in the form of something to relieve her pain; that her condition improved somewhat; that the deafness which she had first experienced totally for awhile got better so that she could hear better, and the pains did not continue to be so insistent, but that at times they would not be as severe, but that even to this day she has sounds in that ear, and assume that on the day of your examination you found her ear to be in the condition that you described, what, in your opinion, would be the cause of that?"

To which question the defendant, by his counsel, then and there objected on the ground that it was incompetent, irrelevant and immaterial, that it was objectionable as a hypothetical question, and because it assumes important elements which do not appear in the testimony in the case and is intended to have the witness guess at something. But the Court overruled said objection, to which ruling the defendant then and there duly excepted, whereupon the witness answered the question as follows:

"Why, she had to have something in there to destroy the eardrums. They were destroyed. My opinion is that they were destroyed by something that was put in the ear."

Whereupon the witness was asked the following question:

"Now, Doctor, you said yesterday in your testimony that upon your examination you found that her 8th nerve was functioning properly, as well as it could be expected under the circumstances. Will you tell the Court and jury what part the 8th nerve has to do with the ear, and what you referred to in that?", and he answered the same as follows:

[fol. 27] "The 8th nerve is a nerve of hearing, and it is a nerve that transmits the sound. After it is received by the inner ear to the brain, it transmits the impulse. As a rule, if we have a case with a normal 8th nerve hearing, we usually can say without a doubt that the inner ear is perfectly all right, that there is no disease of the inner ear."

Thereupon the defendant moved to strike out the answer of the witness on the ground that he has described that condition which existed five years after this treatment, and there is no testimony to show that the inner ear was in the same condition at the time of his examination as it was at the time of this treatment. But the Court overruled said motion, stating, "The question is one of weight rather than competency," to which exception was duly noted.

Cross-examination:

I examined the plaintiff's ears on February 28, 1927. In reply to the question, "Tell me just what the condition you found was" witness replied: "My recollection is that practically all her right drum was destroyed and about between one-third and one-half of her left drum was destroyed." That is all I can tell you, except that there was some scarred tissue in both ears, especially on the right side. By "scarred tissue" I mean adhesions. We usually get a lot of adhesions in middle ear diseases after a long time, or you could get it from other things. Scarred tissue usually follows any mutilation of the tissue and I found this in practically all of the middle ear I could see. The external ear was perfectly normal. Thereupon, in reply to the question, "What effect would acid, poured in the ear, have upon the external ear canal," the witness answered: "If it hit the external canal, it would have the same effect it would have on the inner ear, destroy the tissue. It would very likely cause a stricture if there was enough maintained in there." I must have examined her ears, nose and throat, but I have no notation on my card of examining her nose. Infection is one of the causes which would cause a perforation of the eardrum. It would not result from an infection of the teeth unless the infection got up through the back of the nose, up through the Eustachian tube to the middle ear.

[fol. 28] Q. Might not a catarrhal condition cause the deafness that she complained of?

A. The deafness?

Q. Yes.

A. Well, you might speak of it as a catarrhal deafness. The results I obtained with the tuning fork were negative, so negative that I did not put my findings down on paper. In other words, she heard neither tuning fork by air induction. An impaired nasal breathing and ventilation results sometimes in mouth breathing and an impaired breathing through the nose usually leads to catarrhal conditions of the nose and catarrhal condition of the nose may cause foci of infection when some of the maxillary sinuses are involved from the nose. An infection of the teeth may likewise become a focus of infection, and from those focuses of infection the ear may become involved. He made no examination of the plaintiff's teeth, to discover whether or not they had been or were a focus of infection. He does not recall whether or not he made an examination of her nose to discover whether it had been or was a focus of infection. "The external canal of the ear is not perfectly straight but in some cases is almost straight and in other cases a good deal more crooked; no two canals, as a rule, are alike, so far as straightness is concerned. In this case the canal looked like the average canal. The average canal is about an inch and a half long from the ear in and it is almost a straight canal. In some cases it is not, because some people have wax formations in the ears and it won't come out because the canal is more crooked than in others. You very seldom have difficulty in seeing the drums in the ears." The membrane of the external canal in the ear of the plaintiff was apparently normal. The sinuses are very often the seat of infection, and the antrums likewise. The antrum is one of the sinuses. He did not make any blood test of the plaintiff. He knows absolutely nothing whatever about the condition of the plaintiff's nose, teeth, throat or sinuses in 1922. He made no examination of the sinuses. He got the history of the plaintiff's case from her when she came to him, which is known medically as subjective symptoms, and he usually has regard to subjective symptoms in reaching a conclusion. He did not reach a conclusion at that time; I understand the question to ask if I made a diagnosis of the cause of her trouble; he has not reached a conclusion in his own mind yet. In answering the hypothetical question, he took into

[fol. 29] consideration the condition of her eardrums, the condition of the middle ear as he found it when she came into his office and the condition of her hearing, and he assumed that the plaintiff's ear was in a perfectly normal condition in 1922, and that she had never had trouble previous to the time when this was put in there. That is all he can remember. In answering this hypothetical question, he assumed that in October, 1922, no focus of infection here discussed then existed. The putting of acids in the ear of the plaintiff would have practically the same effect on the external canal as it would have on the middle ear, if there was enough of it to hit on the side. In other words, if there was enough acid to go into the middle ear and fill it up, it would be bound to burn it as it went in. It would be destructive of the external canal, as it would be of the eardrum; there would be some tissue destroyed, undoubtedly. When he examined the plaintiff he found the external canal in a normal condition.

Redirect examination:

The external canal runs from the outside of the ear from the point down to the eardrum, and at the eardrum the middle ear begins. It is possible to put a dropper and by the use of a dropper to insert it into the ear until it reaches the eardrum; and if a dropper is inserted into the ear far enough, until it is about to touch the drum, and strikes the drum and none of the acid strikes the parts before you get to the drum, it would not cause any burn. If the ear was infected from infected teeth, sinuses, the nose or the throat, the symptoms would be that of a middle ear abscess, there would probably be pain and discharge. In other words, if an infection from any of these other places had reached the ear, the symptoms would show in the ear by pain, discharge or an abscess.

Recross-examination:

I should say it would be rather difficult to put acid on the eardrum with a dropper without getting it on the external canal. Counsel for the defendant conceded that it would be impossible for plaintiff to produce Dr. Patten as a witness.

[fol. 30] Thereupon the defendant, by his counsel, moved the Court to strike out the answer of the witness to the hypothetical question theretofore put to him, on the following grounds; first, that in answering the question the witness assumed facts which were not incorporated in the question, namely, he assumed that there were no focuses of infection as described in his testimony under cross-examination and which facts were not incorporated in the question; second, that in answering the question he stated that he took into consideration the examination which he made and what he saw at the time of that examination; thirdly, on the ground that such answer admittedly is nothing more than a mere guess on the part of the witness, because although he undertakes to express an opinion, on cross-examination he testified that up to this time he had not reached a conclusion in his own mind as to the cause of the injury; and, fourth, on the ground that the answer is a mere guess or a mere surmise on the part of the witness, not even founded upon a conclusion of the witness.

But the Court overruled said motion, stating as follows:

The Court: I think the motion will have to be overruled. I followed the doctor's testimony pretty closely and my view of this testimony was that he did not, in answering the hypothetical question, add to it any facts that he was not asked to assume in it. With respect to the last stated ground, not having formed any conclusions in his own mind as to the cause, I understand his testimony to be that he had not formed any conclusions in his own mind as the result of his examination, that opinion is expressed in the answer to the hypothetical question which was an opinion based entirely upon facts that he was asked to assume in that question. For that reason I overrule the motion, to which ruling the defendant duly noted an exception.

Whereupon Dr. Thomas B. Crisp, being called as a witness for the plaintiff, testified as follows:

I am a practicing physician in the District of Columbia and have been for 8 years. I have known the plaintiff and members of her family 20 or 25 years. I have treated the plaintiff twice. It might have been in 1923, the first time,

and the last time was about six weeks ago. I never gave [fol. 31] her any medical attention for her ears, but made a casual examination in 1923. She semed to be hypersensitive and slightly nervous and deaf. I examnied her ears with a light. As I remember it, one drum was apparently ruptured and scarred tissue on the other. The eardrum in the right ear was broken, it looked as though there were fragments around the margins, and the left ear was just inflamed; I cannot remember whether there was scarred tissue or not.

On cross examination, the witness testified he did not make any record of his examination. That about a year and a half ago he was approached about testifying in this case and up to that time he had never had the matter called to his attention since he made the examination. At the time of his examination in 1923 there was just a perforation, a rupture in the middle of the right ear; he would say it was about fifty per cent gone in the center.

Whereupon SIMON HIRSHMAN, being called as a witness for the plaintiff, testified as follows:

I am a practicing lawyer in the District of Columbia and have been for about 5 years. In the latter part of September or the first part of October, 1925, plaintiff in this case came to see me and following my convers-tion with her wrote a letter to the defendant. About a week later he called me on the phone and said he had received my letter and denied having given Miss Cooley any treatment in the ear. He read the card—he said, "I have my card in front of me stating what Miss Cooley was here for. I treated her for the throat and did not treat her for the ear and put no injection at all in her ear."

Thereupon the plaintiff rested.

Whereupon DR. FLOYD MCJ. ALLEN, being called as a witness for and on behalf of the defendant, testified as follows:

I am a practicing physician and surgeon in the District of Columbia. I made an examination of the plaintiff on

November 24, 1925, in Dr. Patten's office. She gave a history of having had some deafness in both ears, of having difficulty breathing through her nose over a period of years, [fol. 32] a history of death trouble resulting in the extraction of a number of teeth about two years prior to the time I saw her, of having had deafness which was more pronounced in damp and rainy weather; she also said that the deafness varied in so far as in damp weather her ears felt more stopped up and her head was more stopped up, her nose was more stopped up; in dry weather it was clearer. She gave a history of feeling very much better and clearer following treatments which she had at the doctor's office in which the nose was treated and opened up and when she could breathe clearly. She gave a history of deafness, which she said began from the time she saw Dr. Gunning. She stated that at the time her teeth were extracted they were abscessed teeth.

I made an examination of her nose and found a spur of the septum low to the right and some deflection of the septum which obstructed breathing. The condition of her nose would result in poor ventilation, tending to cause a catarrhal condition and an inflammatory condition of the membranes. I made an examination of her ears and found the drum of each ear was retracted, there was a slight perforation of the right ear, but none observed on the left. There was some scarring which was limited to the drum alone, a small area over the drum. The external canal was free, that is there was no scarring, no evidence of previous disease or injury, and was normal. Plaintiff gave as I recall a history of childhood diseases, including measles. I tested her hearing with tuning forks and the watch tick and found there was a slight increase of bone conduction about plus 10 seconds, and that the high fork was reduced about 10 seconds and the low fork reduced about 30 seconds. By that I mean the normal ear could follow the sound of the low fork 30 seconds more and the high fork 10 seconds more. I examined her hard palate and found it was high and arched; it was what might be termed an adenoid type, possibly due to the difficult nasal breathing. From the examination which I made of her and the history of the case as I received it from her, it was my conclusion that her deafness was a chronic catarrhal otitis, probably due to two combined factors, one the poor ventilation of the nose and,

secondly, focal infection, most probably the teeth. I formed a conclusion that the cause of the condition of the drum of [fol. 33] her ears was probably an acute otitis meria, early childhood, possibly later in life, probably early childhood. It is well known that most infection of the middle ear travels from the nose through the Eustachian tube, which is a small tube leading from the back of the nose to what is termed the middle ear. There is the external ear, the middle ear and the inner ear. And the infection travels, as a rule, infection from a cold in the head or an infection in the head traveling through the Eustachian tube up to the middle ear, and the tube closes due to inflammation, there being a very small opening through the tube, and the tube closes and an abscess forms and ruptures through the drum, the drum being very thin and being the point of least resistance through which the pus finally ruptures, or it is opened by knives, an incision is made in the drum to allow this pus to escape and this results in a scarring of the drum where the ascess rises up and the retraction of the drum is wider, a drawing in of the drum.

I found the greater part of the drum in the right ear, that is over three-fourths of it. The drum in the left ear was, as near as I can judge, complete, intact. I tested her hearing with a very fine watch tick and she could follow the sound of the tick for 10 inches on the right and 20 inches on the left.

I found no evidence of scarring in the external canals of the ears, none whatever. The effect on the external canal of dropping acid into the ears from a dropper would be a burning, a cauterization of the tissues followed by a sloughing and scarring. By sloughing, I mean a rotting away of tissues, and then scarring.

The plaintiff told me she did not hear well during rainy weather and that on clear days she heard very much better. That signifies to me a catarrhal condition of the Eustachian tubes, the fact that in damp weather they close up, due to the humidity and atmospheric conditions, and the nose is apt to be congested and closed to some extent, and in dry weather the membranes are retracted and opened up, so that it would signify a catarrhal type of deafness.

Whereupon the witness was asked the following question: "Assuming that on the day in October, 1922, when the

[fol. 34] plaintiff in this case was treated by Dr. Gunning, that before entering his office, before such treatment, she complained of pain in her ears, her head, of loud noises in her ears, of dizziness and of nausea, and, assuming that very shortly after the treatment given to her she became so nauseated that she vomited and had to be put upon a bed in the doctor's apartment and had to remain there for some little time, I ask you, in your opinion, were her ears at that time in a perfectly healthy condition?" To which the doctor answered: "I would say that in my opinion they were not in a perfectly healthy condition."

Question. "Assuming the conditions I have given you to have existed at that time, what does that indicate to your mind as a medical man what the condition of the plaintiff was?"

Answer. "An irritation or disease involving the inner ear or the nerve and semi-circular canals."

Asked what the symptoms of Meniere's disease are, the witness stated the onset or the beginning of the disease is quite sudden, it is characterized by nausea, a tendency to be sick at the stomach and you want to vomit, pain, and extreme vertigo or dizziness and a roaring in the ears. It affects the semi-circular canals of the inner ear. It would be possible for a person to have a perforated eardrum and not know it, it occurs frequently. It is not possible to say how long a perforated eardrum might have existed by a mere examination of the ear.

Cross-examination.

At the time I made the examination of the plaintiff there were present Mr. Cusick, Dr. Patten and Dr. Patten's nurse and a Mr. Smith. I do not remember that on that occasion in the course of that examination, while I was examining her ears, that Dr. Patten directed my attention and Dr. Patten said to me: "You see, this eardrum is gone entirely. You see, this other one is partly gone," and of my saying to Dr. Patten: "Yes, I see." There was a slight amount of bleeding at the examination, but no more than might come from ordinary instrumentation. Dr. Patten did not remark in my presence that the plaintiff's ears were very sensitive and inflamed. There was no more pain than

would be seen in the average case in the examination, [fol. 35] and the examination was not with a great deal of difficulty because the plaintiff was suffering pain. Dr. Patten did not have to argue and coax the plaintiff before she permitted me to examine her ears. I made a report of my examination in writing, and have a very detailed report in my office, saw it within a week, and I made a record of examination at the time on my usual history card. I did not bring the card with me because I have gone over the case in my own mind, I have read it over and am familiar with the facts; there was not the slightest reason for not producing it. About four or five days after I made the examination, I sent in a written report of which I kept a copy and have it in my office. I got the history of the case from the plaintiff and put it down on the card. There was a slight perforation of the drum of the right ear, not more than a fourth of the drum. It is not a fact that the eardrum was almost entirely gone. In my opinion, the cause of the perforation was probably an acute otitis media, that is, an acute abscess of the middle ear ruptured the ear drum. If there had been a rupture, the abscess would drain out, pus would come out of the ear. It is not a running ear in the sense the patient tells of it, often the ear only runs for a few hours. If the patient had in childhood suffered with a disease which had caused an infection of the ear, of the middle ear, the abscesses would form in childhood and the rupture would follow at the time of the abscess. There were scars in the left ear which came from a chronic otitis media. The normal eardrum has a certain luster to it; it glistens, and when you get a process of an abscess behind the drum, which may rupture and heal over or which may form a drain through the tube without rupture of the drum, you get a loss of this normal luster of the eardrum and you get a very distinct, not a shining, whiteness, but a whiteness more of a chalky color, which is termed by ear men as scarring of the drum from chronic otitis media, and with that there is a retraction of the drum, a drawing back of the drum. Instead of being straight it is as though it were pulled in, and that is what is termed retraction of the eardrum. That, and the loss of luster, and the change of color to a chalky whiteness, is the scarring referred to. I have treated Meniere's disease; it is relatively rare.

It is a disease of the semi-circular canals or the inner ear. [fol. 36] Otitis media is a disease of the middle ear. I do not believe, and in my opinion, the perforation which I found in the right ear of the plaintiff had anything to do with her imperfect hearing. You may have perfect hearing with a perforated drum. The eardrum has something to do with the hearing.

On redirect examination, the witness testified that he did not exhibit to counsel the record he made of the plaintiff's examination on a card, but showed him a copy of the report, and offered to produce the same.

The causes of Meniere's disease are very obscure. It is a disease the cause of which is considered practically unknown. It comes on very suddenly.

Examination by the Court:

Mr. Gatley, in one of his questions, stated to me the symptoms of Meniere's disease. It is usually a hemorrhage into the semi-circular canals of the ear, that is a rupture of a blood vessel, considered so, or a very acute inflammation involving the semi-circular canals. It originates in the inner ear and would probably be self-limited there. It would probably not affect the eardrum itself. If hemorrhage resulted, the blood is usually absorbed back into the tissues in the semi-circular canals. Damage may result to the eardrum from disease or abnormal conditions that present themselves in the middle ear, an abscess for instance, and an abscess might perforate the eardrum. The perforation I found in the eardrum of the plaintiff gave the appearance of having existed for some time prior. By perforation I mean a hole in the ear drum. It would not interfere necessarily with the function of transmission of sound. In some cases we find a large perforation of the drum with normal hearing. At the time I made the examination there would be no evidence of a pre-existing attack of Meniere's disease except that she did not have normal hearing. I saw nothing more than the symptoms, namely, the noises and deafness, at the time of my examination, suggestive that the plaintiff might have suffered from Meniere's disease, because you can have Meniere's disease with a perfectly normal drum and negative findings as far as objective findings go. There was

[fol. 37] nothing to be seen in the way of objective symptoms of Meniere's disease when I examined her. Ordinarily Meniere's disease does not give objective symptoms.

Whereupon the following questions were asked by the Court and answered by the witness:

Q. Assuming, if you will, Doctor, for a moment, that this lady may have had a kind of catarrhal disorder that you have mentioned here, and that the perforation you observed in her eardrums, that you described to us here, was caused by that catarrhal condition, I want to ask you whether or not such a catarrhal condition is progressive in its injurious results, ever, to the eardrum?

A. To a slight extent—not to the drum, not that it causes a perforation later, but that the drums thicken and become more retracted, yes.

Q. Thicken as the result of the persistency of the catarrhal conditions?

A. Yes.

Q. To the extent it thickens, is it not true that it becomes decreasingly unable to function as a transmitter of sound?

A. Yes, the thickening does away with its tendency to vibrate well.

Q. And the persistency of the catarrhal condition gives further perforation?

A. Not further perforation.

Q. Why not?

A. Because the perforation is most probably the result of an acute process which happened in life, that is, the perforation would not be considered a direct result of the catarrhal process except in so far as you got an abscess. You are more apt to have an abscess.

Q. Perhaps I misunderstood you. I understood you to say that perforation which you observed in the eardrum of this lady you ascribed, from your examination, to a catarrhal condition.

A. No; probably some abscess of the ear early in childhood.

Q. From some childhood disease?

A. Secondary measles, or just a cold, or any acute head inflammation.

Q. Well, what, then, is the effect of a catarrhal condition?

A. A catarrhal condition will give you this scarring referred to in the retraction of the drum.

Q. That is irrespective of the cause of the perforation, then?

A. Yes.

[fol. 38] Q. Then perforation unhealed, followed by catarrhal condition, would not further affect the eardrum except as you told us just now, thickening of the drum?

A. Yes.

Q. You used in connection with your answer to Mr. Gatley's questions with respect to testing the hearing with the use of tuning forks—if I remember your testimony correctly, you gave it in terms of seconds, did you not?

A. Yes, the tuning fork gradually subsides until it cannot be heard, and after the patient cannot hear it any longer you hold your watch and listen to it. The normal ear follows it until such a time as you lose it, and the difference between the time the patient can follow it and the time you carried it through would be the 10 or 20 seconds—for instance, you heard it 10 seconds longer, or 20 seconds longer.

Q. What does that indicate as to the degree of deafness, if any?

A. It indicates more the type than the degree of deafness. The degree of deafness is better indicated by the watch tick and other things. It indicates—for instance, if you have a certain type of inflammation where the bone and the nerve are involved, you get what we call a reduction or loss of the high tones. The patient may carry the low tones well and, with a middle ear and catarrhal sort of deafness, where the drum is becoming thickened, you get a reduction or loss of the low tones, but the high tones are carried well, and it is more to designate the type of deafness than it is the exact percentage of hearing.

Q. Taking the watch that you used, as you told us, in testing Mrs. Stewart's hearing, and assuming that at the time you made the examination she was 24 or 25 years old, if she were possessed of an average, normal hearing at that time, what distance could she hear the ticking of the watch that you used on that case?

A. I should say about 30 inches.

Q. Held in any particular direction?

A. It would have to be held exactly in the right direction, or the sound would be deflected, in a very quite room.

Q. Taking your watch that you used on this occasion, and holding it directing in front, could it be heard at 30 inches?

A. I do not think so. It would not be expected. It should be held so that they would have every benefit of direction as to sound.

[fol. 39] Q. As nearly a direct direction as you could get to the outer ear?

A. Yes, so the ear can pick it out, the outer part of the ear can pick up the sound.

Q. The construction of the ear itself, the outer construction, is intended to hold sound waves?

A. Yes.

Q. And give them a direction into the orifices of the ear?

A. Yes.

Q. And when you speak of 30 inches away from the ear, you hold your watch with special reference to getting the very best results?

A. Yes.

Q. And what distance, did you say, she heard your watch ticking on her right side?

A. I believe it was 10 inches, and 20 on the left.

Q. Would it be correct to say that, hearing at 10 inches and losing the sound after 10 inches, that represented two-thirds loss of hearing?

A. I believe not, because a great many intricate tests have been made, and you are not justified in putting down the exact percentage on the basis of one-third or one-half and so on, and the reason for that is very intricate.

Q. I would not ask you to go into those intricate details. I just want to get a general idea that might be serviceable to us all here. What would be the indication of the loss of hearing where, using such a watch—I got the impression that you said this was a delicate watch?

A. Yes; watches vary in tick. Some can be heard further than others.

Q. And yours was a rather delicate ticking watch?

A. Yes.

Q. And that, holding that in the manner you described, as the most effective means for determining the hearing capacity of the patient on the right side, she lost its sound after 10 inches?

A. Yes.

Q. And if she had been in good hearing condition, if I may use a poor layman's phrase, she ought to have heard it at 30 inches?

A. Yes.

Q But you would not say we would be justified in asserting that she had lost two-thirds of her normal capacity of hearing?

A. No. Such a person might be able to follow a rather low conversational tone and might not be noticed at all and still have lost that much hearing.

Q. It is not true that deaf people often hear even the low conversations, due very frequently to familiarity with [fol. 40] the voice of the speaker?

A. Yes. As they become familiar with the voice, they follow it.

Q. I assumed familiarity with the voice of the speaker.

A. Yes.

Q. Enunciation has a good deal to do with it, has it not?

A. Yes.

Q. Does not a deaf person unconsciously absorb or acquire an ability, after awhile, to read lips to some extent?

A. Yes.

Q. Unconsciously?

A. Yes.

Q So that the mere fact that deaf persons hear a low conversation on a given occasion does not indicate that they are deaf—they may be quite deaf?

A. Yes, but you are careful enough to note whether they are watching you as you speak or not, or whether they are getting it without watching you.

Q. Watching the movement of the lips?

A. Yes, whether they are facing the other way.

Q. You could not tell whether they were watching the sounds of your voice?

A. No.

Q. Or the enunciation?

A. No.

Q. They could watch, perhaps, only the movement of the lips?

A. Yes.

Q. I do not just recall the word, but you distinguish between the use of the teeth and the lips?

A. Yes.

Redirect examination:

The effect upon the nervous system of an attack of Meniere's disease would be that the patient would be unstrung and more or less nervously upset from the continual roaring of the ears, and so forth.

Recross-examination:

Meniere's disease is a disease that varies a great deal in the length of time it lasts. In some cases it lasts over a period of years, the roaring, that part of it. In some cases it is rapidly fatal. The thing that continues is the extreme roaring and the deafness, and more particularly the loss of hearing.

Q. Do I understand from your examination in this case and the history of the case as given to you, that this patient [fol. 41] suffered with Meniere's disease?

A. I did not say that. I do not believe I said that.

Mr. Gatley: No such question was asked.

Whereupon Miss Minnie Spitzer, being called as a witness for the defendant, testified as follows:

I reside in this city. I know the defendant, Dr. Gunning, and have been a patient of his for 16 or 17 years. I was in Dr. Gunning's office on the 20th day of October, 1922, and saw the plaintiff there at that time in his reception room.

Thereupon the witness was shown a certain paper and testified that it was a receipted bill, which bill she paid Dr. Gunning on that day. Thereupon, over the objection of the plaintiff, the paper was received in evidence as corroborative of the testimony of the witness.

I first saw the plaintiff in the doctor's waiting room. There were four or five persons in the room. It was a little after 5 o'clock. I talked with the plaintiff, she was sitting with her hand on her head and said she had a terrible pain in her head and was nauseated and dizzy. I asked her if I might help her in any way and she said she would like to have a glass of water. I went out into the kitchen and got a glass of water from the maid, brought it to her and took her out in the hall just outside of the waiting room. I spoke to the maid and subsequently Mrs. Gunning appeared. Mrs. Gunning got a basin for the plaintiff to vomit in. She wanted to take her to the bath room, but plaintiff said she was not able to walk there. She got the basin and plaintiff vomited out in the hall. I told the plaintiff she could take my place, because my turn was next to go into the doctor's office, although there were three or four after me, and Mrs. Gunning rapped on the doctor's door and told him there was a very sick patient in the hall and asked the doctor if he could take her. The doctor said he would take her in a few moments, which he did. I saw the plaintiff after she came out of the doctor's office. The doctor assisted her into the bedroom in Mrs. Gunning's apartment. I did not go into the bedroom. I then went into the doctors office and afterwards went home. The plaintiff told her that she had a sort of buzzing in her ears, that [fol. 42] she had these spells before and had been treated by other doctors.

Cross-examination:

I visited the doctors office to pay my bill; I had finisher my treatment. I have known both Dr. and Mrs. Gunning sixteen or seventeen years and see them quite frequently. I was the next one to go in the doctor's office after plaintiff. Plaintiff was in the doctor's office about fifteen minutes, I don't think longer. I saw her come out of the doctor's room. He was assisting here and she went into the bedroom. Mrs. Gunning met them in the hall. I heard no scream. No one else came into the office while I was there. I never saw the plaintiff before and have never seen her since until in the Court room. I don't remember when I was first requested to be a witness. I think last Fall about a year ago, maybe longer, I don't just remember. I think

it was in 1925, that is about three years after the occurrence. I don't remember how many times I had been in the doctor's office before this date in the month preceding, about three times a week for treatment and always saw people in the office.

"Do you remember how much you paid on this occasion?"

"Fifty dollars."

"How much."

"Fifty dollars."

"Fifty?"

"Yes."

"Are you sure about that? Is that your best recollection?"

"Yes."

"How much is that receipt for?" (Handing the receipt to the witness.)

"That is for $14.00. I have one for $50.00. I thought probably that was it." I don't know how much he charged me for a treatment or visit. I known him and his wife very well.

Whereupon Dr. Walter A. Wells, being called as a witness for and on behalf of the defendant, testified as follows:

I am a practicing physician and surgeon and have been such since 1894.

Whereupon the following question was asked the witness:

"Doctor, assuming that on the 20th day of October, 1922, [fol. 43] the plaintiff in this case went to Dr. Gunning's office for treatment and that before entering his office she complained of pain in her head, dizziness, a roaring in her ears and nausea, and that she vomited and was taken into his office for treatment, what would the symptoms that I have called to your attention indicate to your mind as a medical man," and which the witness answered:

"It indicates at least that there was a certain amount of irritation in the middle ear and a probability that it was an inflammatory condition."

Whenever there is any inflammation that goes to the suppurative stage it is almost certain to produce a perforation

of the drum membrane. Every child, for instance, who has had an abscess of the ear, it means that the drum membrane has become perforated. It occurs quite frequently in early childhood. I do not think, in my opinion as a medical man, a destructive acid could be dropped into the ear of the patient without injuring the external canal. A perforated eardrum means that the individual will be deaf to some extent, but not seriously. The deafness may be accentuated by other conditions. For instance, subsequent to a perforation, if there was an inflammation in the inner ear, that might accentuate deafness. If acid was dropped into the external canal of the ear, it would produce a considerable erosion which we would expect to be followed by swelling and scar formation of tissue and usually caused the external canal to be quite closed up.

Cross-examination:

If acid were dropped on the eardrum, it would produce a great deal of inflammation and probably perforations; the size of the perforation depends on how much acid were used. It might be slight, it might produce quite a complete perforation or hole by its caustic effect. Every child who has measles does not have an abscessed ear, but infection of the ear is considered a common complication of measles. It does not happen in all cases and only happens when the infection travels to the ear and produces an abscess and the perforation would come from the abscess breaking. We cannot put liquids into the middle ear through the external ear unless there is a perforation. We can put liquids into the middle ear by way of the Eustachian tube. It is possible to put liquid on the eardrum by insertion through the [fol. 44] outer canal; it is usually done by dropping something into the canal with a syringe or an ear dropper or speculum, a funnel-shaped instrument. The speculum would not extend far enough into the canal to protect it. Speculums are about three-quarters of an inch long, but they are not intended to extend through the whole length of the canal. Liquids might be put into the ear where there has been a perforation or a hole in the eardrum, for a soothing or healing effect. If the opening in the eardrum was sufficiently large, the liquid would go through the hole in the drum. If it was not a minute pin-point perforation,

it should find entrance into the middle ear. A perforated eardrum would to some extent affect the hearing; it would not depend so very much upon the amount of perforation, one might have a good sized perforation without the hearing being much affected. The function of the eardrum is more protective than anything else; it helps in the transmission of sound, in helping to convey the sounds to the internal ear. But with that destroyed, the sounds can still be conveyed through the little bones of the ear. It would help, but it is not essential.

Upon examination by the Court, the witness testified as follows:

I think some acids are more caustic than others, but I think any acid would produce the effect I mentioned. A caustic acid might be used occasionally with very great care and limited to minute points for the destruction of small postules in the ear. You could not insert liquids into the inner ear through a perforated drum membrane without some of the liquid getting into the outer external ear. In injecting liquid into the ear with a syringe, we use much more force; with the medicine dropper, it is merely dropped. Unless there was a perforation of the eardrum, you could not get a liquid into the inner ear but it would be confined to the external ear. Liquid could be put into the inner ear, if there was no perforation, through the Eustachian tube. It can only be gotten into the middle ear through the external ear when there is a perforation. The drum membrane helps in the conduction of the sound waves by vibration of the membrane. It is really very slight assistance.

[fol. 45] Whereupon Mrs. Agnes M. Gunning, being called as a witness for *the* and on behalf of the defendant, testified as follows:

I am the wife of the defendant. I remember the occasion when the plaintiff was in his office and when Miss Spitzer as there. I took the plaintiff a glass of water. She told me she was sick at her stomach, nauseated, and asked me to get a basin as she thought she was going to vomit. I asked her if she could go to the bath room. She said she

didn't think she could, she was so very dizzy. I got the basin and she vomited. I then went to the doctor's office and told him there was an ill patient out in the hall and asked how soon he would be able to see her. In a few minutes he took the plaintiff into his office. I was waiting for her when she came out. Dr. Gunning and myself took her into the bedroom. She walked into the bedroom and got down on the bed. I gave her more water and she vomited repeatedly. The doctor kept coming in off and on to see how she was. I asked her in about half an hour if she thought she would be able to go home. She said she thought she would and gave me a phone number and a man's name to call for, which I did, and he came for her in 15 or 20 minutes and I myself opened the door. He came in and walked over to the bed and said: "Are you having another one of your spells?" Plaintiff then got on her hat and he took her out.

About half past six, we were at the dinner table; the plaintiff's mother called up and said she would like to speak to Dr. Gunning. I heard Dr. Gunning tell her over the phone: 'Well, of course, it is a treatment that needs special treatment, and if you want me, I will be very glad to come and see her, but I have done about all I could. I dropped some mineral oil in her ear. That is what I did."

The only thing the plaintiff was given in the bedroom was some ice water. I offered her lemonade, or rather suggested it, and ginger ale. I thought it might settle her stomach because she was very nauseated. She told me that she had been treated by other doctors, that she had this trouble for some time. Mr. Easterling did not carry Mrs. Stewart from Dr. Gunning's office into our bedroom. There was no gentleman in there. Dr. Gunning and myself [fol. 46] helped her into the bedroom. She walked in the bedroom and put herself on the bed, and the gentleman who came to take her home I phoned for.

Cross-examination:

Plaintiff was in the doctor's private office fifteen or twenty minutes. I did not go into the office while she was in there. Nobody but she and Dr. Gunning were in his office. There is an operating table in his office and also

a medical case and a large cabinet with instruments and things on it. A patient could lie down on that table. She went in there about a quarter of six and she came out about five or ten minutes after six and was taken into the bedroom. She walked in there and sat on the bed. When the plaintiff came out of the doctor's office and went into the bedroom, she seemed to be in pain. She said she had had these dizzy spells and that she had a pain in her head, had been having other doctors treat her and she was recommended to Dr. Gunning. She said nothing about pain in her ears, she said "head"; and she spoke of sounds, noises in her head. She was very nauseated. She seemed to be quite sick and kept saying that she had severe pains in her head. She was entirely conscious and gave me a phone number for the man which I phoned for. She remained on the bed from half to three-quarters of an hour. The man arrived for her about 7 or a quarter past 7 and they left immediately. She walked down the steps with the man holding on to her arm. She was not at our house until 10 or 10:30 P. M. I have known Miss Spitzer about 18 years. I have known her in a social way and she has been a patient of Dr. Gunning for eighteen or nineteen years.

Whereupon counsel for the defendant made the following statement to the Court:

"If your Honor pleases, when Dr. Allen was on the stand Mr. Newmyer interrogated him about his record card in this case, and about a copy of the report that he made of his examination. When I got to my office this morning I found the copy of the report and record card, and Mr. Newmyer agrees that I need not call Dr. Allen for the purpose of identifying them, and I now offer them in evidence and ask that they be marked for identification Allen Cross Ex- [fol. 47] amination Exhibit 1 and Allen Cross Examination Exhibit 2," and called the Court's attention, from the record, to the cross examination of Dr. Allen by counsel for the plaintiff and stated that the apparent purpose of that cross examination was to make it appear that for some ulterior motive this witness was not producing either the

copy of the report or the record card, and for that reason they were now offered.

The Court: The witness testified on that cross examination that he consulted his card, if he did not consult it for the mere purpose of refreshing his recollection, and he said——

Mr. Gatley: That is correct, sir.

The Court: And he testified, from memory, and there was no application on the part of the plaintiff to produce the records thus far, Mr. Gatley.

Mr. Gatley: But Mr. Newmyer seemed so anxious to have them.

Mr. Newmyer: I seemed curious to know why he should not produce his original records, as every other doctor.

The Court: I say, there has been thus far no call for their production by you.

Mr. Newmyer: No, your Honor.

The Court: You interrogated the witness, the witness said he had examined at least a card, his answer as to whether he had the report here presented was not quite so clear, but in any event whether he examined one he did so, he said, merely for the purpose of refreshing his recollection. He has a right to do that, has a right to examine any memorandum made by him for the purpose of refreshing his recollection, and he said he did that. I do not think the examination would warrant the introduction of these documents into evidence. The objection is sustained. But the Court declined to receive the said report and the said card in evidence, to which ruling of the Court the defendant then and there duly noted an exception.

The papers so offered in evidence are as follows:

[fol. 48] EXHIBITS IN EVIDENCE

(Card)

"Cooley Mrs. Gertrude
718 7th St. N. E.
Only time can breathe freely through nose is just after treatment

Tons removed in 1914
Physical findings
Adenoid focus
High arched palate
Throat shows clear

Left ear watch tick 20 in
Rt. ear " " 10 in
High fork — 10 sec. both ears
Bone cond. + 10 sec. both ears
Rt. ear drum ◎ perforation
Left ear drum ◑ Slight scar retraction

Free breathing only short time following treatment
Age 25 yr.
Ordinary childhood diseases—measles
Very few colds
Very little sore throat since (Oct. 23-1923
Teeth very little trouble until 3 yr. ago.—Nerves had died several removed
First X-Ray in April this year
Dentist amazed to find so many teeth dead
Laryngitis—several treatments for throat
Felt feeling of hard wax but had never had wax before—supposed to have had sweet oil in both ears
Cannon—gums—vomited—dizziness
Noises for 8 months—2 or 3 days later to Dr. Patten
On rainy days can not hear well
Dr. Patten refused to give findings or opinion in case."

(Copy of Report)

"I made the examination that you requested of Mrs. Gertrude Cooley, on November 24, 1925, at Dr. Patton's office in the Parkwood. Dr. Patton, Mrs. Cooley, and her attorney were present at the time of the examination. I would like to submit the following report in connection with the case.

"There is a history of the ordinary childhood diseases including measles. There is a history of a great deal of dental trouble resulting in the loss of a number of teeth [fol. 49] from abscessed roots during the past three years. I feel that the patient has exaggerated the amount of deafness to some extent as I was able to make myself understood while talking to her in a low conversational tone during the time that I took her history. The patient states in her history that she does not hear as well during rainy weather, and that at this time her head and ears feel stopped up. She also states that she cannot breathe freely

through her nose except for a short time after each treatment in the Doctor's office.

"Examination shows the drums of both ears to be scarred and retracted. There is a small perforation in the drum of the right ear. Examination of the ears with the tuning forks shows the bone condition of both ears to be increased ten seconds. The air conduction is decreased thirty seconds in each ear with the low fork, and decreased ten seconds in each ear with the high fork. This indicates a combined type of deafness which is most probably due to absorption from some focus in infection, most probably the teeth in this case. Examination with the watch shows that the patient hears a watch tick ten inches from the right ear, and twenty inches from the left. Examination of the nose shows some obstruction from a spur on the right side of the septum, well down towards the floor of the nose. There is also some slight deflection of the septum to the left side of the nose. The patient's hard palate is high and arched, and the facies is of a definitely adenoid type.

"In my opinion the deafness is due to a combination of two factors, firstly, to obstruction causing poor nasal ventilation and resulting mouth breathing, and secondly to absorption from some focus of infection, most probably the teeth.

"Diagnosis is chronic otitis media.

"Very sincerely, F. McJ. Allen."

Whereupon the DEFENDANT, being called as a witness in his own behalf, testified as follows:

I am a physician in general practice; graduated from George Washington University in 1905 and have been en- [fol. 50] gaged in the practice of medicine in this District since that time. I remember the occasion when the plaintiff came to my office on the 20th of October, 1922. Mrs. Gunning knocked on the door and told me there was a sick lady in the hall and for me to receive her as soon as possible. I was then engaged with a patient and after dismissing

her I received the plaintiff. After she came into my office, she complained of dizziness and roaring in her head and nausea, she was very nauseated, vomiting. She vomited very shortly afterwards in a basin which I provided for her. She said she had a roaring, buzzing in her head, sort of headache, that she could not stand, she was very dizzy. I did not examine he ear at that time. I thought. Knowing that she had a perforated eardrum, which I made a record of as a result of my examination on October 13th previous, I dropped in a viscid oil, a viscid mineral oil for the purpose of closing up the external eardrums in order to prevent the noise from penetrating into the middle ear. I never have any acids at any time whatever in my office. After I dropped the drops into her ear, the noise subsided and she became rather composed, then I proceeded to take her history for the purpose of differentiating between the various forms of vertigo. We have gastric vertigo, cardiac vertigo, aural vertigo, which is a disease of the internal ear which interferes with the individual in their efforts and power to stand. On her first interview in my office on October 13th, she told me she had had treatments for her ears, and the peculiar part was she did not consult me about her ears, but consulted me about her throat, which was dry, and the history shows was one of mouth breathing, for which I suggested a remedy for mouth breathing in order that her throat might be partly relieved. She was a mouth breather, slept at night with her mouth open. Prior to October 20th I had not done anything for her ears at all, except to examine them on October 13th.

Whereupon the witness was shown a certain memorandum made by him on the fly leaf of a Federal narcotic record book on October 13, 1922, and identified by him. The witness testified that the memorandum was made by him at the time of his examination of the plaintiff on that date. Whereupon the following occurred:

[fol. 51] Mr. Newmyer: Are you offering this book in evidence?

Mr. Gatley: I have not offered it yet.

(Thereupon proceedings were had at the bench as follows, out of the presence of the jury:)

Mr. Gatley: I call the Court's attention to it as follows: "Chase, Miss G. E. Chase, October 13, 1922, both ears perf., very dizzy at times. Discharge of right ear."

And then something referring to a statement which the doctor says he cannot read, and then the initials "N. E."

The Court: On what ground do you base your right to put it in evidence, Mr. Gatley?

Mr. Gatley: I offer it as a memorandum made at the time from information received by the doctor from his patient, and as a record of the examination which he made at that time.

The Court: It would be hearsay evidence. You would have to bring it under some exception to the he-resay rule, would you not?

Mr. Gatley: I do not think so. It is a record made in the regular course.

The Court: That is just it. That is an exception to the he-resay rule. In the present state of the evidence I do not think its receipt would be justified under that test.

Mr. Gatley: He said he made it at the time.

The Court: I understand, the rule does not bring it within the exception to the he-resay rule, and of course it is objected to on the ground it is a self-serving declaration, and if it is admitted at all it must be admitted under some definite exception to the he-resay rule. Of course it is not an account book, and it is not an entry made in the usual course of business.

Mr. Gatley: I will examine him a little further about it.

The Court: Very well.

(Thereupon proceedings were resumed in the presence of the jury as follows:)

By Mr. Gatley:

Q. Was the memorandum that you made in this book one that you were in the habit of making in the regular course [fol. 52] of your practice?

A. No, just in exceptional cases, concerning exceptional cases.

Q. I am just asking you if this was the record that you made in certain instances.

A. Yes, sir.

Q. And if it was made at the time.
A. At the time."

Whereupon the memorandum as contained in the book was offered in evidence on the ground that it was a record made at the time in the regular course of the doctor's practice and as a part of the res gestæ, but the Court declined to receive the same in evidence, to which ruling the defendant duly noted an exception. The memorandum is as follows:

"Perforated ears. Had special treatment.
Miss G. A. Chase, October 13, 1922, both ears perf.
Very dizzy at times. Discharge right ear."

On the 20th of October, after I had dropped this mineral oil into the plaintiff's ears, I took a history of her case for the purpose of determining the cause of her vertigo. The memorandum was made from information furnished to me at that time by her.

Whereupon the defendant was shown a certain writing and stated it was the history taken October 20th, that it was made in his consulting room on the 20th of October, 1922, in the presence of the plaintiff. The witness, being examined by counsel for the plaintiff, testified that the plaintiff told him the things contained in the memorandum, that he thought he remembered the things very well without this memorandum; he had not looked at it recently, that he could remember most of its contents.

Whereupon the same was offered in evidence, both as a record made at the time in the regular course of the doctor's practice, as a part of the res gestæ of this case and as admissions on the part of the plaintiff, but the Court excluded the same, to which ruling of the Court the defendant then and there duly excepted. The contents of said record are as follows:

"Miss G. A. Chase-Oct. 20, 1922-718-7th St. N. E.,

Head: dizzy—buzzing in ear—dry mouth—bad taste nausea, difficulty in standing at times, mouth breather—recommended a mouth breather's cap.

[fol. 53] History: Had been treated before.
Stomach: Full, heavy and sleepy, dizzy and vomited; recommended special diet.

Bowels: Fair.
Sleep: Fair, except things would move on wall.
Treat: Advised patient to wash ears after which to apply mineral oil to soften wax Small amount of wax,
Age: Young.
Statu-e: Thin.
Weight: Spare.
Nervousness: Complained of excessive annoyance especially during day, accompanied with nervousness, fever, and dizziness.
Rx: usual Tid (3 times daily.)
Diagnosis: Minear's disease."

On the 13th of October, when the plaintiff came to me to treat her throat, I obtained from her a statement that she had been suffering from dizziness and ringing and buzzing in the ears and that she had had her hearing impaired to that effect whereby it interfered with her work to some extent. She said that she had been treated in Richmond, Virginia, as well as a number of physicians in Washington. I examined her ears on that date and found that both ears were perforated and the right ear perforated more than the left, which she said gave her very little bother but she knew it existed, and that she had spent enough money on her special treatment and she wanted this throat treatment for the fact it bothered her and her throat was dry, interfered with her speech.

The history of the plaintiff's case, as given to me on October 20th, was that she had buzzing and ringing in the head, noise, and was dizzy at different times, sometimes worse than others. She stated this was the worst attack she ever had. She said she had had treatment for her ears and that she had had her mouth bother her upon awakening in the morning, her mouth dry, which I told her was caused by laryngitis. That she had had treatment for it and that she had been suffering from gastro-intestinal disturbances, for instance especially a heaviness after eating; that she had lost considerable weight and I believe I made [fol. 54] a note of treatment of mineral oil for the purpose of excluding sound from external sources and temporarily preventing the conduction of sound into the middle ear. At

the end of the history I stated that she had, in my mind, a Menieres difficulty, which is a disturbance of the internal ear. After leaving my office she went into the bedroom across from my office. She walked to the door. I assisted her, although it was unnecessary, and in the hall I turned her over to Mrs. Gunning. I went to the bedroom several times to inquire for her. She was lying on the bed. She left perchance by 7 o'clock. I was eating dinner that evening when her mother called on the phone and said her daughter had just arrived home, that she was suffering from dizziness and roaring in her ears and wanted to know what she should do. I told her to continue dropping mineral oil in her ears and that if they wanted me to come out to see her I would be glad to come out; that I had referred her to Dr. Patten and had mentioned Dr. Meade Moore in addition to Dr. Patten. I mean the 23rd, or the 13th, rather, 1922, October, and that evening I had suggested her seeing Dr. Patten or some other specialist. They were specialists. He does not recall Mr. Hirshman and does not know him. He recalls having no such conversation with him as testified. I remember talking to a lawyer, as a result of a letter, but I just do not recall the conversation. I do not recall telling him I put no injection in her ear at all. The chances are I did not.

Cross-examination:

I saw the plaintiff three or four times, I imagine. I did not keep any record of the dates on which I saw patients. As a rule, the only records I keep are a cash account, my cash collections. It does not show the name of the patient or the date of the payment. It shows just the amount collected. I very seldom send bills. My patients generally pay cash. I sometimes run bills with old patients. In those cases I keep a memorandum on slips, send a bill, and when the bill is paid the memorandum is destroyed. I cannot recall that plaintiff ever paid me for the last treatment. I can't recall sending her a bill. I cannot remember whether [fol. 55] or not I ever made any slip of the dates upon which she came into my office; but if I did make a slip, I have not got it now. I have no record of the date of her second visit and I have no record now of the date of her last visit. The first time she came to my office I treated

her for laryngitis, the ordinary spray and treatment of a 10 per cent argerol solution and the treatment was for the purpose of obviating or relieving the difficulty. She paid me two dollars for that treatment. The second treatment I gave her was the same. I did not do anything whatever to her nose at that treatment. The third visit I gave her no other treatment than to simply close the external ear with a fluid. I do not recall ever giving her any treatment for the nose. I do not remember one way or the other. I examined her ears the first day she saw me when she came for treatment for the throat. She did not come to me to treat her ears whatever. I did not examine her ears on any other occasion. I did treat her ears when I put the oil in, simply as a matter of treating the Meniere's disease. I decided that she had Meniere's disease during the attack on October 20th. I did not decide that on the day I examined her ears the first time she saw me. On that occasion she was dizzy and had a buzzing in her head, but she never had the typical symptoms of Meniere's disease. I did not examine her ears on the 20th of October. I knew they were perforated and I dropped the oil in for the purpose of closing the drums for the prevention of noise entering into the middle ear and causing these disturbances, which immediately relieved her effect. She became partly composed so she could answer my questions. The oil relieved her pain and her dizziness. I put the oil in both ears. I put it in the right ear first, dropping it in with a dropper, getting the oil out of a bottle on the stand, so labeled. I had 12 or 13 bottles there. In the other bottles there was a 50% solution of iodine, a 5% solution of copper sulphate, a 2% solution of copper sulphate, pure alcohol, pine oil, cocaine colution, and gentian violet stain. Plaintiff made no objection to my putting oil in the second ear after I had put it in the first. She did not knock my hand away and offered no resistance whatever. It was after the treatment that I took the history of her case from her. The perfora-
[fol. 56] tion in the right ear was quite a perforation in the lower segment, anterior, covered about one-fifth of the eardrum. In the left ear it was not discernible by objective inspection, the only way I discovered it was by having the patient hold her nose and blow and I discovered with the stethoscope she had a whizzing in her ear, showing a per-

foration. I did not use a stethoscope on the day I put the oil in her ear. I had only one dropper and I used that for all my liquids. She did not lie down at all in the room where I put the oil in her ear, but she sat right beside me and was not on the operating table at all. I remember seeing the gentleman who called for her leaving the hall door going out into the apartment hall. I did not see him while Miss Chase was in my office room. Plaintiff was in my office Room where I treated her for, I imagine, fifteen minutes and in the bed room after that about half an hour. On her first visit she was complaiing about her hearing and I told her to see Dr. Patten or Dr. Moore, and on October 20, the day of her last visit after the oil treatment, I told her of the importance of having special treatment. I also told her mother on the telephone I would recommend special treatment, and I mentioned Dr. Patten. I told her mother she had Meniere's disease, in my opinion, and I would come out to see her if she wanted me to. It is not a fact that her mother asked me to come out and I said I would send some medicine. I did not send her any medicine to my knowledge. I received a telephone call from her people the next day; but they did not ask me to come to see her. They just wanted to know what they should do. Meniere's disease is quite rare.

Thereupon the witness was interrogated by the Court as follows:

Examination by the Court:

Q. Doctor, I understood you to say that on the occasion of Mrs. Stewart's first visit to you she gave evidence of suffering from Meniere's disease. Am I right about that?

A. She had a dizziness and buzzing in her head, but she had no——

Q. I say, it was on that occasion that you considered or concluded that she was suffering from Meniere's disease? [fol. 57] A. I told her she should have special treatment, she told me she got dizzy at times at her work.

Q. The question is whether on that occasion, that is the occasion of her first visit, you concluded from your examination or symptoms, and so on, that she was suffering from Meniere's disease.

A. Buzzing and ringing is always a precursor of Meniere's disease, they precede the real attack, the specific attack, the real attack.

Q. I am afraid that does not answer my question. The question is whether or not you concluded on the occasion of her first visit that she was a sufferer from Meniere's disease.

A. No, I don't think I can make a diagnosis of Meniere's disease from buzzing and ringing of the ears.

Q. When did you reach the conclusion?

A. On the evening when she was in the major attack.

Q. That was on the 20th?

A. On the 20th of October.

Q. Can you tell us whether the onset of Meniere's disease is a slow process or rapid?

A. Very, very sudden; strikes the person very suddenly. It is greatly intensified by the noise of the mid ear.

Q. You saw symptoms on the 13th of October, that is on the occasion of her first visit, which added to what you observed on the occasion of her last visit you reached the conclusion that at least by October 20 she was then suffering from Meniere's disease?

A. Meniere's disease.

The onset of Meniere's disease is very violent, and sudden and rapid, in most instances causing severe shooting pains. I told Mrs. Stewart on her last visit she had Meniere's disease.

Thereupon the defendant rested.

Whereupon BROOKS C. EASTERLING, being called as a witness in rebuttal for the plaintiff, testified as follows:

On the occasion of his visit to Dr. Gunning's office he did not say to the plaintiff, "Are you having another one of your spells?", or anything like it. And that he did not receive a telephone message from Mrs. Gunning or anyone else requesting him to come to the office.

[fol. 58] Whereupon the PLAINTIFF, being recalled, testified that on the occasion of her last visit to Dr. Gunning's

office she did not say to him that she had had a lot of trouble with her ears and had spent a lot of money on them and this was the worst attack of the ears that she had ever had; Doctor Gunning never on any occasion recommended that I see Dr. Patten or Dr. Moore; that Doctor Gunning never told her that she had Meniere's disease; that she never told him that she had been to a doctor in Virginia for treatment to her ears.

Whereupon JONAS M. SMITH was called as a witness for the plaintiff and testified that he is an attorney and is acquainted with Mr. Ralph Cusick and at one time had associated offices with him; that he remembers on or about the 24th day of November, 1925, being present at the office of Dr. Patten when Dr. Allen, in the presence of Dr. Patten, Mr. Cusick and the witness, made an examination of the plaintiff. He was in the doctor's private office when that examination was made. Whereupon the witness was asked the following question:

"I will ask you whether or not on that occasion Dr. Patten directed the attention of Dr. Allen in his examination of Mrs. Stewart's ears and made the statement in the presence of Dr. Allen, as Dr. Allen was making his examination, words to this effect: 'You see that the right eardrum is practically all gone and that a part of the left is gone,' and Dr. Allen in reply said, 'Yes, I see.' "

To which question the defendant by his counsel objected on the ground that it was not proper rebuttal testimony, that no foundation for its introduction was laid and that by means of the question the plaintiff should not be allowed to indirectly get before the jury testimony that could not be gotten in directly. But the Court overruled such objection, stating as follows:

"The Court: My recollection is that that question was put to the Doctor, giving time and place and substantially the language that was said to have — used by Dr. Patten to Dr. Allen on that occasion, and for the purpose of laying the foundation to contradict that witness. Objection overruled.

[fol. 59] Mr. Gatley: Do I understand that it is admitted for that purpose only, or for the purpose of establishing a fact?

The Court: I understood, Mr. Gatley, as I have just remarked, that the foundation was laid by Dr. Allen on the stand for the purpose of contradicting him.

Mr. Gatley: That is what I understood. Do I understand that this testimony is offered only for that purpose?

The Court: That is what it referred to, and that alone.

Mr. Newmyer: That is the purpose for which it is offered.

Mr. Gatley: I have made my objection and your Honor has made your ruling?

The Court: I overrule the objection.

Mr. Gatley: Note an exception, please."

To which ruling the defendant then and there duly excepted.

Whereupon the witness answered the question in the affirmative.

Motion for Directed Verdict

The foregoing is the substance of all the testimony offered at the trial of the above entitled cause.

Whereupon the defendant by his counsel moved the Court to direct the jury to return a verdict for the defendant on the ground that the plaintiff had failed to establish her case as laid in the declaration and on the ground that a verdict for the plaintiff must necessarily be based upon conjecture or guesswork, and on the further ground that the testimony showed that the injury complained of might have resulted from several or more causes, for one or more of which the defendant could not be held liable. But the Court overruled said motion, to which the defendant duly noted an exception.

PLAINTIFF'S REQUESTED INSTRUCTIONS GIVEN

And thereupon, at the request of the plaintiff, the Court granted the following instructions to the jury:

"Plaintiff's Prayer No. 4

"The jury are instructed as a matter of law that the preponderance of evidence does not mean necessarily the number of witnesses on one side or another, but the jury have the right, if they so find, to believe one witness as against a number, if the testimony of that one witness is more convincing to their minds, considering all the facts and circumstances of the case as shown by the evidence."

[fol. 60] "Plaintiff's Prayer No. 5

"If the jury believe from the evidence that any witness has knowingly testified falsely about any material fact as to which that witness could not reasonably be mistaken, then the jury may if they so desire, disregard the whole of that witness's testimony."

DEFENDANT'S REQUESTED INSTRUCTIONS

And thereupon the defendant requested the Court to grant the following instructions to the jury:

"Defendant's Prayer for Instruction No. I

"You are instructed upon the whole evidence to return a verdict for the defendant."

"Defendant's Prayer for Instruction No. II

You are instructed that the defendant Edward J. Gunning was not an insurer of the success of the treatment given the plaintiff by him, but that in giving such treatment he was only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by members of his profession in the same line of practice in this locality."

"Defendant's Prayer for Instruction No. III

"You are instructed that before plaintiff can recover in this case you must find: First, that she sustained the injuries complained of in the declaration; second, that such injuries were caused by negligence on the part of the defendant, Dr. Edward J. Gunning; third, that such injuries were the natural and probable result of such negligence. If the plaintiff fails to establish any of these elements by fair preponderance of the evidence, your verdict must be for the defendant."

"Defendant's Prayer for Instruction No. IV

"You are instructed that you cannot presume negligence on the part of the defendant in this case, but the burden of proving negligence is upon the plaintiff to establish by a fair preponderance of the evidence that the injuries sus-
[fol. 61] tained by the plaintiff, if any, were caused by the negligence of the defendant. And if the plaintiff fails to establish this fact by a fair preponderance of the evidence your verdict must be for the defendant."

"Defendant's Prayer for Instruction No. V

"If you find from the evidence that the treatment given the plaintiff by the defendant was given with that degree of skill and learning ordinarily possessed and exercised by members of his profession in the same line of practice in this locality, at the time such treatment was given, then the defendant is not guilty of negligence in the giving of such treatment and your verdict must be for the defendant."

"Defendant's Prayer for Instruction No. VI

"You are instructed that if you find from the evidence that the last treatment given the plaintiff by the defendant, Dr. Edward J. Gunning, was on October 20, 1922, then the plaintiff is not entitled to recover and your verdict must be for the defendant."

But the Court refused to grant the requested instructions numbered I and III and to the refusal of the Court to grant

each of such requested instructions the defendant duly noted exceptions.

CHARGE TO JURY

Thereupon the Court of its own motion charged the jury as follows:

"Gentlemen of the Jury, Miss Cooley, now Mrs. Stewart, instituted this action against Dr. Gunning on October 22, 1925, and she alleges that on or about October 23, 1922, and for some time prior thereto, the doctor defendant was engaged in the practice of medicine, and on that day and year, that is to say, October 23, 1922, and for sometime prior thereto, the plaintiff was ill and required the services and attention of a physician, and that prior to the happening of the grievances thereafter set forth in her complaint she had made several visits for professional attention to the office of the defendant, and on the day aforementioned, that is to say, October 23, 1922, the defendant was engaged by the plaintiff and undertook to make an examination and [fol. 62] diagnosis of her condition, and that the defendant, in the course of such employment by the plaintiff on this day, undertook to treat her and it then and there became and was his duty to exercise reasonable care and prudence in the examination and treatment and to avoid injuring her; but she says that notwithstanding this duty he did not use such care and prudence, but negligently and carelessly injected and discharged into the ears and internal organs of said plaintiff a solution which was harmful, dangerous and destructive of the tissues and drums and ears and which was not a solution used by physicians and surgeons in the exercise of such care as is usually used by practising physicians and surgeons in this locality in the treatment of ears, by reason of which negligence and carelessness on the part of the defendant the plaintiff suffered great pain and mental anguish and will in the future continue so to suffer, and is permanently maimed, disfigured and wounded and the ear-drums destroyed, and such disfigurement is of a permanent nature; that in consequence of the injuries thus alleged by her to have been inflicted upon her by defendant negligently, she has been unable to follow her usual work and

occupation and has been deprived, and so forth, and claims damages in the sum of $25,000.00.

"That, in substance, gentlemen, is what she charged or complains here as it is found in what we call the first count of the declaration or complaint, but the declaration contains a second count which introduces, I think, but one additional element, and I will just call your attention to that.

"It recites the alleged employment by the plaintiff of the defendant, his acceptance of the employment, and his undertaking to treat her at the time alleged here, and it says, in regard to the alleged negligence in that treatment by him, that the solution that he injected into her ear was not sweet oil, but was a solution which was harmful, dangerous and destructive. The introduction of the element of denying that sweet oil was injected on this occasion into her ear by the defendant differentiates the second count of the declaration from the first, but in other respects substantially the two counts are alike.

"Now, gentlemen, do not forget—I am sure you will not, and I am sure you know that this declaration or complaint [fol. 63] thus presented is not a piece of evidence. You are allowed to take it in your jury room, read it over if you desire, in order to refresh your recollection of the complaint for the purpose of determining, in reviewing the evidence in the case, whether she has sustained what we call the burden of proof, sustained by the evidence in the case what she has alleged in this declaration or complaint. The paper itself, the statements contained in it, are not evidence and cannot be treated by you as evidence. They are designed merely to inform the defendant of the nature of the charge and complaint made against him, in order that he may prepare himself to meet, as best he may, the charges thus set forth.

"Now, the burden, the obligation of establishing the case thus set out, rests upon the plaintiff. That burden requires of her that she should satisfy you gentlemen of the jury by a preponderance of the evidence that what she has alleged or asserted in this declaration is well founded as a matter of fact.

"The defendant in this case filed, as is required he should do, his answer. He denies the negligence. He denies that he was negligent on the occasion on which he says he

treated this lady, but he goes further. He says that the treatment that he gave her under the employment which he accepted took place on October 22, I think it is——

"Mr. Gatley: October 20th.

"The Court: Yes, October 20th, 1922. Remember, gentlemen, that the plaintiff said that this occurrence took place on October 23, 1922. He says it occurred on October 20, 1922, and the action brought by the now Mrs. Stewart was brought by her on October 22, 1925.

"The defendant therefore alleges, and it is one of the defenses that he interposes, a defense which he has a right to interpose under the law if well founded, a defense for which he cannot be legally cr-ticized—that, in effect, under the law this action by Mrs. Stewart was brought too late, because, if it is true that this occurrence of which Mrs. Stewart complains took place on October 20, 1922, as the defendant insists it did, and not on October 23, 1922, as the plaintiff insists it did, the action in that event was brought too late, for whatever right of action growing out of this occurrence Mrs. Stewart may have had would be barred by [fol. 64] the statute of limitations in force in this jurisdiction, of three years.

"You, therefore, have, gentlemen, two issues here. Logically I suggest to you that your consideration be first given to your deliberation upon the evidence in this case as to whether or not, from that evidence, it is the fact that this occurrence took place on October 20, 1922, as the defendant alleges, or whether it occurred on October 23, 1922, as the plaintiff alleges. If from the evidence you are satisfied that the occurrence took place on October 20, 1922, your duty is plain, and it is that you should return a verdict for the defendant, for, in that event, you will find from the evidence that this action was not brought within the period of time allowed by the law of this jurisdiction.

"If, however, you should conclude from the evidence in the case that the occurrence took place not on October 20, 1922, but on October 23, 1922, then this action, being brought on October 22, 1925, was within the time, and though it might have been just one day makes no difference. We have nothing to do with the policy of the statute which permits a defense of the limitations. The solid wisdom behind the law of limitation is that where a people have a

just cause of action it is proper—indeed, in the interest of justice it is desirable—that where it cannot be settled by amicable means and an appeal must be made to the courts of the country to get what is claimed by a plaintiff in the case to be justice, that the plaintiff should act promptly because, by the mere lapse of time between an occurrence which is alleged to give to a person a cause of action against another and the time when an action is brought upon it, witnesses may die or disappear, and human memory is frail. We do forget things, and the law makers, acting as sensible human beings in the enactment of laws, realizing those things, have said to persons claiming rights against others, 'You must bring your action within such period of time as we now enact in our law, and if you do not and the defendant, when sued, interposes that as a defense, as he or she has a perfect right to do, you are out of court by your own act, your own failure to act.'

"That is the policy and theory of the law, and that is the law and whether you think it should be the law or should [fol. 65] not be the law or whether I think so makes no difference. It is the law, and it is your duty to observe it when you come to weigh the evidence upon this statute of limitations.

"Now, supposing that from the evidence in the case you reach the conclusion that Mrs. Stewart's contention as to when this occurrence took place is the correct one, that is, that it occurred on October 23, 1922, and not on October 20 as the defendant insists, then this defense of limitations will disappear and then logically you will proceed to the consideration of the evidence that has been introduced and heard here on the question of whether or not this defendant was negligent.

"Now, before I say anything to you about that, I am going to read to you the prayer that I have granted at the instance of the defendant on the statute of limitations, and say nothing about it. It is Prayer No. 6 (Reading:)

" 'You are instructed that if you find from the evidence that the last treatment given the plaintiff by the defendant, Dr. Edward J. Gunning, was on October 20, 1922, then the plaintiff is not entitled to recover and your verdict must be for the defendant.'

"I have already said to you gentlemen that the burden of proof rest upon the plaintiff, Mrs. Stewart, in this case to establish the facts alleged in her declaration, and she must do so by a preponderance of the evidence. I will read to you a prayer on that point that I have granted at the instance of the plaintiff. It is the plaintiff's Prayer No. 4, which must be your guide in the matter on the question of law. (Reading:)

" 'The jury are instructed as a matter of law that the preponderance of evidence'—preponderance by which the burden of proof is to be maintained—'does not mean necessarily the number of witnesses on one side or another, but the jury have the right, if they so find, to believe one witness as against a number, if the testimony of that one witness is more convincing to their minds, considering all the facts and circumstances of the case as shown by the evidence.'

"You, as you have frequently heard, gentlemen, are the exclusive judges of the testimony, of the weight and credi- [fol. 66] bility that you will give to the testimony of this, that or the other witness who appeared before you and testified to facts or alleged facts in a case. That must be your guide with respect to this matter of the preponderance of evidence. That is the law of the case with regard to that feature, and this preponderance of evidence is scarcely susceptible of any more definition than the very words themselves imply.

"This might be said about it, that when you gentlemen in your deliberation in the jury room are considering this evidence, if you should find on a review of the evidence that it does not preponderate in favor of either side, that the evidence equally balances in your mind—if that should be the result, if that is what you should conclude about the matter, then the plaintiff would in that event have failed to maintain the burden by a preponderance of evidence, because you would have found in that event that there was no preponderance in favor of either side, that the evidence balanced equally and it is your duty to return a verdict for the defendant in that case.

"Now, it is admitted—and I do not understand that this fact, at least, is in controversy—between the parties that Dr. Gunning, the defendant, did undertake a treatment of this lady, the plaintiff, either on October 20, 1922, or on

October 23, 1922. What duty toward her did he assume? It is a case of patient and physician. What was his duty toward her when he assumed, when he did, how he did and as he did, as you may find from the evidence—what was his duty towards her? Let me say, first, in the language of the prayer that I have granted at the instance of the defendant—it is Prayer No. 2—that:

"'You are instructed that the defendant Edward J. Gunning was not an insurer of the success of the treatment given the plaintiff by him, but that in giving such treatment he was only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by members of his profession in the same line of practice in this locality.'

"And again, in that same connection, here is defendant's Prayer No. 5 which I have granted:

"'If you find from the evidence that the treatment given the plaintiff by the defendant was given with that degree of [fol. 67] skill and learning ordinarily possessed and exercised by members of his profession in the same line of practice in this locality, at the time such treatment was given, then the defendant is not guilty of negligence in the giving of such treatment and your verdict must be for the defendant.'

"It would be a very serious matter, gentlemen of the jury, if a doctor, when he assumed the relation of physician to a patient for the purpose of treating that patient, entered into an obligation of insurance. Of course, that is not the case. No physician, by the acceptance of employment as such by a patient, insures the success of his treatment, and, of course, the law does not exact that of him; but when a doctor holds himself out in a community as a physician or surgeon, and invites, in all proper ways, we may assume, the support of citizens by their employment of him as a physician or surgeon, as the case may be, he says in effect to them, that 'I will, in performing my professional duty to you, exercise that reasonable degree of skill and learning that generally is exhibited by other members of my profession in this locality. I do not undertake to give you the highest degree of skill that some members of my profession might be able to afford. I do not profess to be a Pasteur or an Osler; I am a physician and surgeon, and I will give to you reasonable care and treatment; I will exercise reasonable skill.'

"That is all the law exacts of him, as that prayer indicates.

"There is another element which is the basis of a prayer that I am going to read to you, and it is common to all negligence cases, that you can indulge in no presumption of negligence by the mere fact of the happening of an occurrence. You can not, therefore, in this case presume that there was negligence because on this occasion this defendant undertook to treat this lady. Negligence, gentlemen, must be established by evidence, not by presumptions that a thing happened. The reason for that is plain, that a thing that happens may be due to no act of negligence at all, but from circumstances quite beyond the control of parties at the moment when it happened. Therefore, there can be no presumption of negligent action, either of commission or omission, by the mere happening of an occurrence. That has been incorporated in defendant's Prayer No. 4 which I have granted, and I will read it to you:

[fol. 68] " 'You are instructed that you can not presume negligence on the part of the defendant in this case, but the burden of proving negligence is upon the plaintiff to establish by a fair preponderance of the evidence that the injuries sustained by the plaintiff, if any, were caused by the negligence of the defendant. And if the plaintiff fails to establish this fact by a fair preponderance of the evidence your verdict must be for the defendant.'

"Now, gentlemen, when a person comes into court, alleging, as here in this case, a negligent act on the part of the defendant in his treatment of this lady, that negligence may be established by circumstances not necessarily from the lips of eye witnesses, but from a variety of circumstances that, if they are developed in the testimony, bring home to the jury the conclusion that the negligence happened as alleged in the complaint or declaration of the Plaintiff.

"In this case there is no evidence that anybody saw the treatment administered on this occasion. The plaintiff was in the office of the defendant, where he was accustomed to receive his patients and treat them there, and for this purpose it may be assumed that he administered the treatment in his office and those treatments necessarily took place in the privacy of his office, but whether so or not there is no evidence in this case that anyone was present

save the plaintiff and the doctor, and what did she do? She conceded here that she employed him to treat her, and that he undertook the treatment of her. As to the occurrence itself, there is evidence tending to show that when she came to the doctor's office, whatever day it was, she says that she came there in conformity with an engagement that he had made, that the defendant had made, that she theretofore had been there on a prior occasion for a treatment other than that of a treatment to the ears. That is her testimony.

"There is testimony tending to show that when she got there she complained to the defendant that she was suffering some discomfort in her ear, and she said it seemed to her as if this discomfort was due to some accumulation of wax in the ear and she asked him to look at it. There is testimony tending to show that he did, that he said to her that there is nothing the matter with her ear, but 'I will put [fol. 69] in a little sweet oil (or mineral oil)'—whatever the evidence was—'to relieve any wax accumulation that may be there.' At any rate, he says that he did put sweet oil or mineral oil, whichever it is, in her ear on this occasion. He says pure mineral oil, but whether pure mineral oil or sweet oil, apparently all are agreed that neither is deleterious or dangerous for use in the ear, as I remember it, and then you have listened to the evidence of what followed.

"When I speak of evidence, I am not referring alone to the evidence here on behalf of the plaintiff, but the evidence as well on behalf of the defendant as to what followed. And it is at that point, gentlemen of the jury, that the real question for solution arises. What did the doctor put in her ear? Did he put into her ear anything that inflicted upon her the injury that she complains about here? I am not going to dwell at all upon the evidence. She says, alleges and charges that he put into her ears some solution harmful, dangerous and destructive of the tissues and drums of the ears, and, in the second count, that he did not put any sweet oil or pure mineral oil, whichever it is.

"Now, what is the fact? That is the crux of this case, gentlemen, on the question of alleged negligence of the defendant, but you must not guess what he did. You can not found a legal verdict against this defendant on a mere guess as to what he put in. You have got to be satisfied from the

evidence in the case that he put in some solution. Plaintiff does not attempt, in her declaration, to say what kind of a solution, excepting a solution harmful, dangerous and destructive of the tissues and drums.

"Did he do it? If he did, he did not exercise the care required of him by the rule of law that I have already stated to you. If you are satisfied that he did do so, and that the injuries resulted therefrom as claimed by this plaintiff, and you have to determine that also from the evidence, you would, in that event, proceed to award damages in favor of plaintiff against the defendant, and in considering the question of those damages, remember, gentlemen, that it is compensation merely that you would, in that event, be according to the plaintiff, and compensation for what? Compensation for such pain and suffering as you may find from the evidence in this case, the plaintiff suffered. The injury, permanent if you find it is permanent, to her ear or [fol. 70] her ears; if you find that as a result of a negligent act such as she alleges against the defendant the eardrum of one was either wholly or largely destroyed and the other injured; if you find from the evidence that one of the things that happened to her was an impaired hearing; and, to the extent that this pain and suffering and such injuries to her ears as you may find from the evidence she did suffer, whether it is permanent or not, or likely to continue into the future—those are elements, gentlemen, that should be taken into consideration by you, but it must be established by the evidence; you may only find their existence from the evidence in this case. In awarding compensation to this lady for the injuries suffered by a negligent act on the part of the defendant—not *a* but *the* negligent act alleged against her, you are not to charge this man with liability if some other trouble caused the pain and suffering and the injury. It must be the cause alleged in this declaration, or not at all.

"I have granted another prayer at the instance of the plaintiff, which I will read to you. It has to do with the question of your judgment of weight and credibility that you give to testimony of witnesses. It is the plaintiff's Prayer No. 5. (Reading:)

" 'If the jury believe from the evidence that any witness has knowingly testified falsely about any material fact as

to which that witness could not reasonably be mistaken, then the jury may, if they so desire, disregard the whole of that witness' testimony.'

"You have heard this prayer given to juries before. It has probably been given to you gentlemen on some of the juries you sat on, and I do not think it needs any enlightenment. It is a matter that is left to the sound judgment and discretion of the jury. You might detect a witness on the stand testifying falsely to a material fact about which he really could not have been mistaken, and, if you do, you have the right, if you choose to do so—you may, if you choose disregard all of the witness' testimony, and proceed upon the theory in such case that the faith of the jury in the truth of such witness' testimony has been shaken by the fact that they have detected the witness, with respect to [fol. 71] some material fact, testifying falsely, on a material fact about which he or she could not be mistaken. That is the law of the case.

"I think, gentlemen of the jury, that I have given to you all of the prayers which I have granted to either the plaintiff or the defendant in this case. Of course, I might say this in addition, that when you come to consider the evidence of the injuries alleged to have been suffered by the plaintiff in this case, they must, of course, be, as I have already pointed out, the injuries complained of in the declaration, and not any other injuries, but it must appear that those injuries were caused by the negligence of the defendant, and, of course, when you consider the evidence in the case, you are entitled to infer and deduce reasonably, rationally, from facts established other facts bearing upon the question, but it must appear before you would be justified in returning a verdict for the plaintiff that the injuries suffered, if you find that they were suffered from any treatment on this occasion given by the defendant, were suffered as a result of a negligent treatment and a failure to observe the duty that he would owe to the plaintiff when he accepted employment as a physician, as I have pointed out and read to you from one of the prayers.

"I do not believe, gentlemen, that I can say anything more that would aid you in your deliberation in this case, except to say this, that this case, of course, is of importance to both of the litigating parties. On the part of the plaintiff, the young women at the time this occurrence took place,

at the threshhold of her womanhood, finds, according to her contentions, that she has suffered as she has claimed she has with an impaired hearing and pain and suffering. On the part of this defendant, he is charged in this complaint with malpractice, to use a layman's expression rather than the law, in the performance of a professional duty. It is a pretty serious charge against a professional man and therefore the case is of importance to him. But merely because in the one instance it is a young woman who is complaining or in the other that it is a professional man, a doctor, undertaking treatment of a patient coming to him for treatment—those facts in themselves must not control your verdict, but they do invite you to a serious and an impartial and a fair weighing of all of the evidence [fol. 72] and the claims and contentions that are made here by the two parties litigant. In reaching a conclusion, that conclusion should be based upon principles of justice, and if that is accomplished it matters not who is hurt, and your duty as a part of this tribunal with me would have been faithfully discharged.

"Take the case, gentlemen."

Before the jury retired to consider of its verdict, the defendant by his counsel noted an exception to that part of the Court's charge where the Court "tells the jury where the crux of this case is, on the ground that it unduly emphasized the theory of the plaintiff in the caes and her testimony regarding it, without presenting to the jury the theory of the defense and the testimony regarding it, and therefore is to the prejudice of the defendant in the case."

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the defendant by his counsel tenders his bill of exceptions and prays the Court to sign, seal, and make the same a part of the record, and to have the same force and effect as to each and every of the exceptions taken by the defendant and noted as aforesaid, as if the same had been set forth in a separate bill of exceptions, signed and sealed by the Justice presiding at the trial, which is accordingly done this 12th day of September, 1927.

F. L. Siddons, Justice.

Above bill of exceptions O. K. A. L. Newmyer, Att'y.

Tuesday, April 10th, A. D. 1928.

* * * * * * *

No. 4682

EDWARD J. GUNNING, Appellant,

vs.

GERTRUDE L. COOLEY

The argument in the above entitled cause was commenced by Mr. H. P. Gatley, attorney for the appellant, and was continued by Mr. A. L. Newmyer, attorney for the appellee, and was concluded by Mr. H. P. Gatley, attorney for the appellant.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 4682

EDWARD J. GUNNING, Appellant,

vs.

GERTRUDE L. COOLEY, Appellee.

Appeal from the Supreme Court of the District of Columbia

Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices

Mr. Chief Justice MARTIN delivered the Opinion of the Court:

This is an appeal from a judgment recovered by the appellee, as plaintiff below, for damages for personal injuries alleged to have been sustained by her in consequence of certain negligent medical treatment administered to her by the defendant as a physician.

It is conceded that at the time in question the defendant was a physician in general practice, and that he treated plaintiff as a patient. It is claimed by plaintiff that as part of the treatment defendant undertook to inject a drop or two of sweet oil into each of her ears, but that because of his negligence and lack of skill he actually injected into her ears a solution which was not sweet oil but was a harmful,

dangerous and destructive solution which injured the drums of her ears, in consequence whereof she suffered great pain and her ears were seriously and permanently injured, and she was made permanently deaf in her right ear, to her great damage. Defendant claims that he actually placed only a drop or two of pure mineral oil in the external ear of plaintiff; that this was harmless and caused no injury to her ears, and was proper professional treatment. The jury rendered a verdict against defendant, and judgment was entered accordingly; whereupon this appeal was brought.

At the close of all the evidence the defendant moved for a directed verdict upon the ground that plaintiff had failed to establish her case. The court overruled the motion, and that ruling is assigned as error. This assignment necessitates a brief reference to the evidence.

The evidence on behalf of the plaintiff is to the effect that on October 21, 1922, she first consulted the defendant for a trouble in her throat and received treatment therefor; that a few days later she again called upon defendant, who advised her that mouthbreathing had caused her throat trouble and there was something wrong with her nose, and that it needed treatment, which he accordingly gave her; that soon afterwards she again went to defendant's office and told him she had a slight cold and felt "wax or something" in her right ear; that after an examination defendant said he would drop a little mineral oil in her ear; that there were twelve or thirteen bottles of medicine on defendant's cabinet, all alike in appearance, and but a single dropper for use with all of them; that defendant by means of this dropper then injected some fluid into her right ear, whereupon she instantly became dizzy and suffered horrible pain in her ear, and heard roaring sounds like the firing of cannon; that she told defendant of this but he assured her it would be all right, and undertook to put some of the fluid into her left ear, but she succeeded in knocking his arm away before much got into that ear; that defendant became greatly excited because of plaintiff's condition but attempted no further treatment; that plaintiff immediately became ill and lost control of her whole body, and was put to bed at the doctor's house and kept there until late in the evening, when she was carried to a cab and taken to her home, where

she was carried from the cab and put to bed; that for a time she was totally deaf, and consulted an ear specialist who treated her every day for two months, and three times a week afterwards, and that she was still taking treatment; that at the time of the trial she could not hear at all with her right ear, but suffered a roaring sound in it, and that she heard what she could hear with her left ear; that up to the time of the treatment in question plaintiff's hearing was perfect, and that she had never suffered from any abscess of the ears or any complaint or disease affecting them. The evidence furthermore tends to show that in February, 1927, plaintiff's ears were examined by a specialist who found that the eardrum of the right ear was practically all gone and that of the left ear from one-third to one-half gone, and that the tissues were scarred. The specialist testified that various diseases or injuries might cause such a condition, or that it might be caused by the injection of some destructive substance into the ears, and that he was unable to state from his examination the cause of plaintiff's condition, but in answer to a hypothetical question based upon his examination together with the evidence submitted on behalf of plaintiff he gave his opinion as follows: "Why, she had to have something in there to destroy the eardrums. They were destroyed. My opinion is that they were destroyed by something that was put in the ear."

The defendant introduced evidence, including the testimony of experts, tending to sustain the claim that the fluid which he injected into plaintiff's ears was pure mineral oil, that it caused no injury, and that it was proper treatment; that plaintiff was not prostrated by the treatment as claimed by her but was dizzy and nauseated before the treatment, and was relieved and benefited by it; and that plaintiff told defendant that she had taken treatment for her ears from other physicians. The defendant stated that when he examined plaintiff's ears he saw her eardrums were perforated and that he "dropped in a viscid oil, a viscid mineral oil for the purpose of closing up the external eardrums in order to prevent the noise from penetrating into the middle ear;" that "the noise" then subsided and plaintiff became composed and shortly afterwards left the house; that defendant diagnosed plaintiff's ear trouble as a disease of the inner ear.

The rules applicable to motions filed by defendants for directed verdict in cases like this are well settled. "The rule supported by the great weight of authority and by reason is that it is only where the court must say that, as a matter of law, no recovery can be had under any reasonable view of the evidence, that a verdict for defendant will be directed," 39 Cyc. 1577. "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them." Richmond & Danville Railroad v. Powers, 149 U. S. 43, 45. "The right to have the facts determined by the jury ceases only when but one reasonable view can be taken of the evidence and of its every intendment, and that view is utterly opposed to the plaintiff's right to recover." Railroad Co. v. Carrington, 3 App. D. C. 101, 108. "Where there is testimony of a substantial character to go to the jury, it is always for the jury to determine the question of the preponderance of evidence, subject to the revisory power of the court to order a retrial." Mr. Justice Morris in Warthen v. Hammond, 5 App. D. C. 167, 173. "The court is never justified in directing a verdict, except in cases where, conceding the credibility of the witnesses, and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon." Adams v. W. & G. Rd. Co., 9 App. D. C. 26, 30. "A motion to direct a verdict is an admission of every fact in evidence, and of every inference reasonably deducible therefrom. And the motion can be granted only when but one reasonable view can be taken of the evidence therefrom, and that view is utterly opposed to the plaintiff's right to recover in the case." Glaria v. Washington Southern R. Co., 30 App. D. C. 559, 563. "In other words it is only where all reasonable men can draw but one inference from the facts that the question is one of law for the Court." Chesapeake B. R. Co. v. Prez, 39 App. D. C. 58, 69. "The courts of review in this country are applying with increasing strictness the rules limiting the right of the trial judge to invade the province of the jury. * * * The

rule more generally followed is that 'it is only where all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the Court.'" Catholic University v. Waggaman, 32 App. D. C. 307, 320.

Judged by these standards the refusal of the trial court to direct a verdict for the defendant was right. For while the testimony was conflicting upon important points, there was substantial evidence in support of the plaintiff's claim. If the plaintiff's evidence be accepted as true, together with the reasonable inferences deducible from it, it would be clearly wrong to say that all reasonable men could draw but one conclusion from it, and that conclusion utterly opposed to the plaintiff's right to recover. It is true that there was no direct proof of the specific identity of the fluid which was injected by defendant into plaintiff's ears, but it was competent for the jury to determine from all of the circumstances disclosed by the evidence whether it was a harmless mineral oil or a dangerous and destructive fluid, and if the latter whether the defendant was negligent in administering such treatment to the plaintiff. It is plain that in many cases a patient if in fact injured as plaintiff claims to have been, could have no other kind of evidence upon which to rely.

The record furthermore discloses that the motion for a directed verdict together with all other questions raised in the case were carefully considered by the trial justice, not only at the time of the trial, but also later when a motion for a new trial was filed by the defendant. This motion was based in part upon a claim of newly discovered evidence, and was supported by affidavits. The trial justice in passing upon it held that defendant's claim of newly discovered evidence was "overwhelmingly" contradicted by counter affidavits filed by the plaintiff, and that upon a reconsideration of the entire case he must overrule the motion, which he did.

Other assignments of error are presented by appellant, among them the charge that the lower court erred in permitting plaintiffs expert witness to answer the hypothetical question put to him by plaintiff's counsel. We find no error in this ruling, for the question called for an answer based on both the personal knowledge of the witness, acquired by his examination of plaintiff, and upon assump-

tions such as were supported by evidence already introduced in behalf of plaintiff.

The appellant also charges that the lower court erred in refusing to admit in evidence certain written memoranda of the defendant, and of the witness Allen. One of these writings was a memorandum written by defendant on the fly leaf of a Federal narcotic record-book on October 13, 1922, at the time of his examination of plaintiff on that day, and gave a brief description of plaintiff's condition at the time. The defendant testified that he was not in the habit of making such memoranda in the regular course of practice, but made them only in exceptional cases. Defendant's other memorandum was written at the time of plaintiff's last treatment, and both were offered in evidence, together with a similar memorandum written by defendant's witness Allen. The defendant and Allen testified from memory to all of the facts stated in the memoranda, and were not denied the right to use them to refresh their recollection, but the court excluded the writings when offered as corroborative evidence in the case. This ruling was not erroneous. In Sechrist v. Atkinson, 31 App. D. C. 1, this court held, following Gurley v. MacLennan, 17 App. D. C. 170, that when the plaintiff, testifying as a witness in his own behalf, has a distinct recollection of the circumstances surrounding the transaction in question, it is error to admit in evidence written memoranda of the facts, made by him at the time. It is said by Mr. Chief Justice Shepard, "It appears from the bill of exceptions that the plaintiff had a distinct recollection of the facts and that he neither used, nor needed, the memorandum to refresh his memory. Its introduction could, therefore, serve no other purpose than to corroborate his evidence. Under these conditions it was clearly inadmissible." See Rudd v. Buxton, 41 App. D. C. 353, 358; Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99; Romer v. Jackson, 39 Md. 585.

Exceptions were taken by defendant to the lower court's charge to the jury, but we find no error in it. The court, at defendant's request, delivered the following instructions to the jury, towit;

"You are instructed that the defendant Edward J. Gunning was not an insurer of the success of the treatment given the plaintiff by him, but that in giving such treatment

he was only required to possess and exercise that degree of skill and learning ordinar-ly possessed and exercised by members of his profession in the same line of practice in this locality."

"You are instructed that you can not presume negligence on the part of the defendant in this case, but the burden of proving negligence is upon the plaintiff to establish by a fair preponderance of the evidence that the injuries sustained by plaintiff, if any, were caused by the negligence of the defendant. And if the plaintiff fails to establish this fact by a fair preponderance of the evidence your verdict must be for the defendant."

The charge of the court was throughout full and correct, and conformed to the principles set out in the opinion of this court in Cayton v. English, 57 App. D. C. 324.

The record presents certain other assignments of error, relating in part to a plea of the statute of limitations, but they need not be referred to in detail, for we have fully considered the record and find no error in any of the rulings of the lower court.

The judgment is affirmed with costs.

Endorsed: No. 4682. Edward J. Gunning, Appellant, vs. Gertrude L. Cooley. Opinion of the Court per Mr. Chief Justice Martin. Court of Appeals. District of Columbia. Filed January 7, 1929. Henry W. Hodges, Clerk.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 4682

EDWARD J. GUNNING, Appellant,

vs.

GERTRUDE L. COOLEY, Appellee

Mr. Justice VAN ORSDEL, concurring:

I concur in the opinion affirming the judgment of the trial court. I am forced to this conclusion, notwithstanding my belief that a very grave injustice has been done in this case. Under the strict rule adopted by this court in the cases cited and relied upon by the Chief Justice in his

opinion, there is in my judgment sufficient evidence to carry this case to the jury.

A motion for a directed verdict challenges the sufficiency of the evidence to take the case to the jury. It presents a question of law for the trial court and the appellate court which alone can be determined by an analysis of the evidence. It is a mere travesty to say that the court is bound to send the case to the jury, if there is any evidence tending to support the contention of the plaintiff, and shut its eyes to the justice or injustice of a verdict resting upon such a flimsy basis. It is my fixed opinion, as expressed on many occasions, that the rule established in the decisions referred to, and in many other decisions of this court, is too strict and should be modified to the extent of confiding in the court the power to determine whether or not the evidence is sufficient to raise a reasonable issue of fact, capable of supporting a verdict that will meet the substantial ends of justice.

I trust that such a rule of procedure may yet be adopted by the unanimous concurrence of the justices of this court, as will lift the trial justice in this District from a mere automaton to the exercise of his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure as will elicit verdicts based upon substantial issues of fact rather than mere caprice and sympathy.

Endorsed: No. 4682. Edward J. Gunning, Appellant, vs. Gertrude L. Cooley. Concurring Opinion by Mr. Justice Van Orsdel. Court of Appeals. District of Columbia. Filed January 7, 1929. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia

No. 4682

Edward J. Gunning, Appellant,

vs.

Gertrude L. Cooley

Mr. Justice Robb, dissenting:

The testimony of the plaintiff was almost completely discredited through the testimony of an intelligent and dis-

interested witness, who was present on the occasion when the acid was supposed to have been put in plaintiff's ears. The majority opinion states that the evidence was circumstantial. In my opinion, there is no basis whatever for the verdict and judgment.

The only physician who testified for the plaintiff was the specialist who examined her, and whose testimony is referred to in the majority opinion. The hypothetical question put to him was based upon an assumed state of facts. On cross-examination this specialist stated, "I understand the question to ask if I made a diagnosis of the cause of her trouble; he has not reached a conclusion in his own mind yet. * * * The putting of acids in the ear of the plaintiff would have practically the same effect on the external canal as it would have on the middle ear, if there was enough of it to hit on the side. In other words, if there was enough acid to go into the middle ear and fill it up, it would be bound to burn it as it went in. It would be destructive of the external canal, as it would be of the eardrum; there would be some tissue destroyed, undoubtedly. When he examined the plaintiff he found the external canal in a normal condition."

If this specialist after an examination of plaintiff's ears was unable to reach "a conclusion in his own mind," the jury ought not to have been permitted to guess away the reputation and money of this physician. If acid had been put in plaintiff's ears as described by her, the external canals, according to the uncontradicted testimony of this specialist, would not have remained in a normal condition, but would have been burned. The profession of medicine will become hazardous if judgments such as this are to be sustained.

Endorsed: No. 4682. Edward J. Gunning, Appellant, vs. Gertrude L. Cooley. Dissenting Opinion by Mr. Justice Robb. Court of Appeals. District of Columbia. Filed January 7, 1929. Henry W. Hodges, Clerk.

Monday, January 7th, A. D. 1929.

* * * * * * *

No. 4682, January Term, 1929.

EDWARD J. GUNNING, Appellant,

vs.

GERTRUDE L. COOLEY

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Chief Justice Martin, January 7, 1929.

Concurring: Mr. Justice Van Orsdel.
Dissenting: Mr. Justice Robb.

COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 4682

EDWARD J. GUNNING, Appellant,

vs.

GERTRUDE L. COOLEY

The Clerk will please prepare transcript of record on application to the Supreme Court of the United States for writ of certiorari, and include therein the following:

1. Printed transcript of record.
2. Argument.
3. Judgment.
4. Opinion of Mr. Chief Justice Martin.
5. Concurring opinion of Mr. Justice Van Orsdel.
6. Dissenting opinion of Mr. Justice Robb.

7. And this designation.

Benjamin S. Minor, H. Prescott Gatley, Arthur P. Drury, Attorneys for Appellant.

Endorsed: No. 4682. Edward J. Gunning, appellant, vs. Gertrude L. Cooley. Designation of Record on Application for Writ of Certiorari. Court of Appeals, District of Columbia. Filed January 23, 1929. Henry W. Hodges, clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 89, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals per designation of counsel in the case of Edward J. Gunning, appellant, vs. Gertrude L. Cooley, No. 4682, January Term, 1929, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 24th day of January, A. D. 1929.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1929

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,981. District of Columbia Court of Appeals. Term No. 672. Edward J. Gunning, petitioner, vs. Gertrude L. Cooley. Petition for writ of certiorari and exhibit thereto. Filed February 2nd, 1929. File No. 33,981.

(6536)

FILE COPY

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. [redacted] 31

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No.

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Edward J. Gunning, respectfully shows unto this Honorable Court:

This suit was instituted in the Supreme Court of the District of Columbia, against the defendant, a practicing physician, to recover damages in the sum of $25,000, for alleged malpractice.

The basis of the suit was the claim made in the declaration that the defendant negligently injected into

the plaintiff's ears a solution, not sweet oil, which was harmful, dangerous and destructive of the tissues and drums of the ears (R. pp. 2-3).

The defendant, both in his pleas and as a witness, denied the acts of negligence charged (R. pp. 5-50).

The theory of the plaintiff at the trial was that defendant had injected an *acid* into her ears.

The case was tried to a jury. The onus of proving the negligence charged and relied upon, rested upon the plaintiff.

Not being able to establish the charges made by her own testimony, plaintiff called as an expert witness in her behalf a specialist in the treatment of diseases of the ear, nose and throat.

This witness testified that in February, 1927, he made an examination of plaintiff, and that he also obtained from her the history of her case, that is, a statement from her as to the trouble from which she was suffering, and the treatment she had undergone for it, *including a statement by her to the effect that she had "had acid put in her ears"* (R. p. 22). On the stand he was also plied with all sorts of hypothetical questions, in which he was asked to assume the existence of many facts and the non-existence of many others, of which there was no proof. Notwithstanding all of this he testified *that at the time he made the examination of plaintiff and obtained from her the history of her case, he did not reach any conclusion as to the cause of the injury, and had not reached any conclusion in his own mind yet* (R. p. 28).

He further testified (R. p. 29):

"The putting of acids in the ear of the plaintiff would have practically the same effect on the external canal as it would have on the middle ear, if there was enough of it to hit on the side. In other words, if there was enough acid to go into the middle ear and fill it up, it would be bound to burn it as it went in. It would be destructive of the external canal, as it would be of the ear drum; there would be some tissue destroyed, undoubtedly. *When he examined the plaintiff he found the external canal in a normal condition.*"

This testimony of the only expert called in behalf of the plaintiff is absolutely supported by the testimony of two experts called in behalf of the defendant (R. pp. 33, 43).

In addition to this the plaintiff's expert testified to many other causes, that is, other than putting acid in the ears, that could have produced the condition of which plaintiff complained (R. pp. 23, 24, 28). This testimony accords with that of defendant's experts (R. pp. 28, 32, 43, 48, 52, 53, 58).

In addition to this we have the positive testimony of one of defendant's experts that in his opinion the cause of plaintiff's condition was a "chronic catarrhal otitis," probably due to two combined factors, one the poor ventilation of the nose, and, secondly, focal infection, most probably the teeth (R. pp. 32, 33). This opinion was based upon facts furnished by the plaintiff herself, and as a result of a physical examination of the plaintiff by the expert (R. p. 32).

Upon the whole case defendant moved the court to direct the jury to return a verdict in his favor on the following grounds:

1. That the plaintiff had failed to establish her case.

2. That a verdict in her favor must necessarily be based upon conjecture or guess work.

3. The testimony showed that the injury complained of might have resulted from several or more causes, for one or more of which the defendant could not be held liable.

The motion was overruled and exception duly noted (R. p. 59).

The case was submitted to the jury and resulted in a verdict for plaintiff in the sum of $10,000 (R. p. 5). Judgment was entered thereon, and an appeal to the Court of Appeals of the District was noted and perfected (R. p. 7).

II.

On January 7, 1929, the opinion and judgment of that Court, affirming the judgment of the Court below (not yet reported) was handed down by the Chief Justice, concurred in by Justice Van Orsdel (R. p. 74). The basis of this opinion is that there was sufficient evidence to take the case to the jury.

Mr. Justice Robb dissented upon the ground that *"there was no basis whatever for the verdict and judgment"* (Dissenting Opinion, R. p. 86).

In the concurring opinion filed by Mr. Justice Van Orsdel (R. p. 84), he says: "I concur in the opinion

affirming the judgment of the Trial Court. *I am forced to this conclusion notwithstanding my belief that a very grave injustice has been done in this case.* * * * A motion for a directed verdict challenges the sufficiency of the evidence to take the case to the jury. It presents a question of law for the Trial Court and the Appellate Court which alone can be determined by an analysis of the evidence.

It is a mere travesty to say that the Court is bound to send the case to the jury if there is any evidence tending to support the contention of the plaintiff and shut its eyes to the justice or injustice of a verdict resting upon such a flimsy basis. It it my fixed opinion as expressed on many occasions that the rule established in the decisions referred to and in many other decisions of this Court is too strict and should be modified to the extent of confiding in the Court the power to determine whether or not the evidence is sufficient to raise a responsible issue of fact capable of supporting a verdict that will meet the substantial ends of justice.

I trust that such a rule of procedure may yet be adopted by the unanimous concurrence of the Justices of this Court as will lift the Trial Justice in this District from a mere automaton to the exercise of his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure as will elicit verdicts based upon substantial issues of fact rather than mere caprice or sympathy."

III.

The grounds upon which this petition are based are as follows:

1. The question of the liability of a physician for alleged negligence or malpractice is one of general importance, constantly arising in the Courts of this District, and the Federal Courts throughout the country.

A careful examination of the official reports of the decisions of this Court fails to disclose that the Court has ever passed upon the questions of law involved in the determination of the liability of a physician upon a charge of negligence or malpractice.

2. The Court of Appeals failed to make proper application of the opinion and judgment of that Court in the case of Levy vs. Vaughn, 42 App., D. C. 146, and of decisions of this Court in accordance with the principles thereof.

3. The Court in its opinion wrongfully determined the powers and duties of a Trial Justice, and in so doing misapplied applicable decisions of this Court.

4. The Court in its opinion assumes and holds that because there was some conflict in the testimony offered at the trial, the Trial Court was bound to submit the case to the jury for its determination, even though a "grave injustice" might thereby result to the defendant, and a verdict against him, not based upon "substantial issues of fact," but based upon

"mere caprice and sympathy" might result from such action on the part of the Trial Court. This assumption and holding resulted from a misapplication of applicable decisions of this Court.

IV.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court in the case entitled "Edward J. Gunning, Appellant, vs. Gertrude L. Cooley," to the end that said cause may be reviewed and determined by this Court, as provided by law; and your petitioner prays that the Judgment of the said Court of Appeals of the District of Columbia in said case may be reversed by this Honorable Court.

And your petitioner will ever pray.

EDWARD J. GUNNING,
By BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY.

DISTRICT OF COLUMBIA, *ss:*

H. Prescott Gatley, being first duly sworn, says: That he is attorney for the petitioner Edward J. Gunning; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

H. PRESCOTT GATLEY.

Subscribed and sworn to before me this 31" day of January, 1929.

NEENAH LAUB,
Notary Public, D. C.

We hereby certify that we have examined the foregoing petition for writ of certiorari and that, in our opinion, it is well founded in point of law and should be granted by this Honorable Court; and that the petition is not filed for purpose of delay.

H. PRESCOTT GATLEY,
BENJAMIN S. MINOR,
ARTHUR P. DRURY,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Without setting forth *in extenso* the testimony of the expert witnesses called in the case (Pet. pp. 2, 3), we think it can be briefly and fairly summarized as follows:

1. The expert called by the plaintiff testified that with all of the knowledge which had come to him respecting the injury complained of by the plaintiff, he had not made up his mind what was the cause of that injury.

2. If acid had been placed in the ears of the plaintiff sufficient to have caused the injury complained of, there would necessarily have followed an injury to the external canals of the ears. The external canals of the ears were in a normal condition.

This testimony was substantiated by the expert witnesses called by the defendant.

3. The condition of plaintiff's ears was due to a chronic catarrhal otitis, probably due to two combined factors, poor ventilation of the nose, and focal infection, most probably the teeth. This was the testimony of one of the defendant's experts based upon facts furnished him by the plaintiff herself and a physical examination of plaintiff made by the witness.

It is respectfully submitted that before a physician can be held liable in damages for alleged negligence or

malpractice, there must be expert medical testimony to support the plaintiff's case.

> "Only those are qualified to testify as to whether there was negligence in the method of treatment who themselves possess the skill required to administer such treatment, and to them the jury must listen."
>
> McCoy *v.* Buck, 157 N. E. 456 (Indiana, 1927).

If the only expert called by the plaintiff is unable to advise the Court and jury what the cause of the plaintiff's injury was, and, if, as in this case, the testimony of that expert negatives the claim of the plaintiff that the injection of acid into her ears caused the injury complained of, how is it possible for a jury of laymen, unlearned in the sciences, to say affirmatively that the plaintiff has established her claim that the injury was caused in any such manner.

In the case of Levy *v.* Vaughn, reported in 42 App. D. C., 146, the Court adopted the reasoning of the opinion of the late Chief Justice Clabaugh, the Trial Justice, in directing a verdict for the defendant. That was a malpractice case where death resulted from the administration of ether. In that opinion it is said:

> "Therefore, with the facts staring you in the face that nobody says to this jury that this intestate died from the effects of ether, is it possible that the jury can say what the expert witnesses and all other witnesses in the case say that they cannot tell? Does the law mean that a jury can pass upon the cause of a death of a man, when those who ought to know cannot tell?

> The plaintiff's witnesses have said exactly the same thing that the witnesses for the defendant have said. Then, when all the witnesses concur in the statement that they cannot tell, on what theory of the law can the Court submit to a jury of twelve men, unlearned in the sciences, the question of determining as to condition, when the experts themselves cannot tell?"

Does the fact that in that case death ensued while in this case an alleged injury ensued, rob the reasoning of the late Chief Justice of all its soundness and logic?

See Dissenting Opinion Mr. Justice Robb (R. pp. 86, 87).

The instant case is much stronger for the defendant than the case referred to. As heretofore pointed out (Pet. p. 3), all of the experts testifying in the case were in agreement that other than putting acid in the ears, there were many causes that could have produced the injury of which plaintiff complained. For many of these causes the defendant could not possibly be held liable.

In the case of Bennett *v.* Washington Terminal Company, 55 App. D. C., 111, 113, an ordinary negligence case, where there was no definite testimony showing how the decedent met his death, whether he was killed by a train of the Pennsylvania Railroad or by an engine of the Washington Terminal Co., the Court of Appeals, following the decision of this Court in the case of Patton *v.* Texas & Pacific Ry. Co., 179 U. S., 658, in affirming the judgment of the trial court in

directing the jury to return a verdict in favor of the defendant, says:

> "No one saw Bennett struck. No one knows what he did after the time he was cut off from the view of the witness Arnold by the movement of the Pennsylvania train. Counsel for defendant advance the theory that he was in fact struck by that train and thrown on track 19, where he was run over by the shifting engine. This theory is as plausible as any other that can be indulged in this case. To have left the question of defendant's negligence to the jury would have opened up an endless realm for speculation and conjecture, for the building of inference upon inference and presumption upon presumption.
>
> • • • • • • •
>
> "The presumption that the accident resulted from any one of these causes might be indulged. Where, as in this instance, the accident may have resulted from any one of a number of different causes, and in any one of a number of different ways, the court will not permit the jury to speculate as to how it occurred, and arrive at a verdict which at best would amount to a mere guess. It was incumbent upon the plaintiff to establish the negligence of the terminal company by affirmative proof."

This court in the Patton case, *supra*, at page 663, says:

> "• • • it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony

leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

II.

The basis of the majority opinion of the Court below is that inasmuch as there was a conflict in the testimony of the witnesses the Trial Justice was bound, under the previous decisions of that Court, to submit the case to the jury for its determination; that he lacked the power to deal with the case in such manner as would prevent "grave injustice" to the defendant, and, being a mere "automaton" he was compelled to leave the case to the decision of the jury even though, in so doing, his action would result in eliciting a verdict based, not upon *substantial issues of fact*, but rather upon *mere caprice and sympathy*.

We quite agree that by the verdict and judgment in this case a *grave injustice* was done the defendant. We likewise agree that such verdict was not based

upon the determination of *any substantial issue of fact.* We assert that its only basis was "*mere caprice and sympathy.*"

The concurring opinion filed herein evinces the hope that "such a rule of procedure may yet be adopted by the unanimous concurrence of the Justices of this Court as will *lift the Trial Justice* in this District from a mere *automaton* to his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure *as will elict verdicts based upon substantial issues of fact rather than mere caprice and sympathy.*" (Italics ours.)

With profound respect for the opinion thus expressed we respectfully submit the adoption of any such rule is unnecessary. Trial Justices, according to the decisions of this Court, covering a long period of time, hereinafter referred to, not only have such *power,* but the *duty of exercising such power* rests upon them. If any Trial Justice in this District functions as a "*mere automaton*" he does so for one of two reasons:

1. Because he fails to realize the power vested in him, and the duty resting upon him by virtue thereof, or,

2. Realizing the power thus vested in him, and cognizant of such duty, he neglects to exercise the power and perform the duty.

As far back as the case of Pleasants *v.* Fant, 22 Wall., 116, this Court, in unequivocal terms, defines the duty of the trial court as follows:

"It is the *duty of the Court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.*" • • •

"In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide *whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor.*" (Italics ours.)

Again says the Court in the case of Patton *v.* Texas & Pacific Ry. Co., *supra,* in speaking with reference to the powers and duty of the trial judge:

"At the same time, *the judge is primarily responsible for the just outcome of the trial.* He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, *but one who in our jurisprudence stands charged with full responsibility.*" (Italics ours.)

The most effective way of exercising this power and performing this duty by trial judges is for them to determine "whether or not the evidence is sufficient to raise a responsible issue of fact capable of supporting a verdict that will meet the substantial ends of justice."

We admit that in the case at bar there was a conflict of testimony. But we do not admit that there was any substantial conflict of testimony with respect to any substantial or controlling issue in the case. We

do not deny the general rule laid down in the authorities referred to in the majority opinion of the Court. We respectfully deny its applicability to the case at bar, as it appears from the record. It is not every case where there is a conflict of testimony that should be submitted to a jury for determination. If that were so the power vested in trial judges and the duties resting upon them, as defined by the Supreme Court, are meaningless.

It is only where there is a substantial conflict of testimony respecting substantial and controlling issues of a case, and only where the state of the testimony would warrant or justify a verdict accordingly as the jury might determine the right and truth of such conflicting testimony, and where a verdict thus found would do substantial justice between the parties, that the court is justified in submitting a case to the jury for its determination. But where the state of the testimony is such that "grave injustice" to a party may result from a verdict or where a verdict may follow based upon "mere caprice or sympathy" the trial judge is never justified in letting the case go to the jury. *The trial judge stands charged with full responsibility to protect parties litigant against such results.*

In the case of Pleasants *vs.* Fant, *supra*, this Court in discussing the duty of the trial judge to decide whether the plaintiff has offered evidence *sufficient to support a verdict in his favor,* says the question is:

> "Not whether on all the evidence the preponderating weight is in his favor, that is the

> business of the jury, but conceding to all the evidence offered the greatest probative force to which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? * * * Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial granted? Such a proposition is absurd, and accordingly *we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.*" (Italics ours.)

In speaking of the power of trial judges to direct verdicts and the duty of the court so to do, it is said in Oscanyon *vs.* Arms Co., 103 U. S., 261:

> "The practice is a wise one, it saves time and costs; *it gives a certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the court.*" (Italics ours.)

See also:

Randall *vs.* B. & O. R. R. Co., 109 U. S., 478.
District of Columbia *vs.* Moulton, 182 U. S., 576.
Famous Smith *vs.* United States, 151 U. S., 55.

In Improvement Company *vs.* Munson, 14 Wall., 442, it is said:

> *"Nor are judges any longer required to submit a question to a jury merely because* SOME *evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury* CAN PROPERLY PROCEED *to find a verdict for the party producing it, upon whom the onus of proof is imposed."* (Italics ours.)

In Bowditch *vs.* Boston, 101 U. S., 16, it is said:

> "It is now the settled rule in the courts of the United States that whenever, in the trial of civil cases, it is clear that *the state of the evidence* is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, *it is the right and duty of the judge to direct the jury to find according to the views of the court.* Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." (Italics ours.)

In Commissioners, etc., *vs.* Clark, 94 U. S. 278, it is said:

> *"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.* Ryder *vs.* Wombwell, Law Rep. 4 Ex. 39.
>
> *Decided cases may be found where it is held that if there is a* SCINTILLA *of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can* PROPERLY *proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."* (Italics ours.)

In Coughran *vs.* Bigelow, 164 U. S. 301, it is said:

> "The foundation for those rulings was not in the constitutional right of a trial by jury, for *it has long been the doctrine* of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed, and that, *if the evidence be not sufficient* to warrant a recovery, IT IS THE *DUTY of the court to instruct the jury accordingly,* and,

> if the jury disregard such instruction, to set aside the verdict." (Italics ours.)

We respectfully submit in the light of these authorities and in view of the state of the record in the case, the trial court was imposed with the duty of directing a verdict in favor of the defendant. It had the power so to do and thereby protect the defendant from "grave injustice" and a verdict based, not upon substantial evidence establishing the charges made against him, but upon "mere caprice and sympathy." Having failed to exercise this power and to perform this duty it was within the power of the Court of Appeals, and the duty was imposed upon it, to correct this error and to right the wrong consequent upon it.

We have a determination of one Justice of the Court of Appeals that "there was no basis whatever for the verdict and judgment." We have also the determination of another justice, "that a very grave injustice has been done in this case," evidently founded upon the conviction that the verdict of the jury was not based upon the determination of any "responsible issue" in the case, but rather upon "mere caprice and sympathy"—a verdict that does not "meet the substantial ends of justice."

In this situation it is respectfully submitted this case should be determined according to the broad principles of justice and fairness laid down and consistently followed by this court in the foregoing cases, rather than upon the strict and narrow rule laid down in the opinion of the Chief Justice filed herein. If this

latter rule is to prevail we unhesitatingly say, as did Judge Thayer in Haire *vs.* Reese, 7 Phila., 140:

> "• • • God forbid that the law should apply any rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession."

Respectfully submitted,

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. [redacted] 31

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 51

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

The opinion of the Court below is reported in 58 Appeals D. C., 304; 30 Fed. (2d), 467.

The opinion of Chief Justice Martin, affirming the judgment of the trial court, based upon the holding that because of a conflict in the testimony the trial court was bound to submit the case to the jury for its de-

termination, will be found in the Record, pages 73-79.

The concurring opinion of Mr. Justice Van Orsdel, which he felt "FORCED" to render, NOTWITHSTANDING HIS BELIEF THAT A VERY GRAVE INJUSTICE HAD BEEN DONE IN THE CASE, will be found in the Record, pages 79, 80.

The dissenting opinion of Mr. Justice Robb, holding THAT THERE WAS NO BASIS WHATEVER FOR THE VERDICT AND JUDGMENT, will be found in the Record, pages 80, 81.

For convenience petitioner will be referred to in this brief as ~~plaintiff~~ defendant, and respondent as ~~defendant~~ plaintiff.

Statement of the Case.

Three years, lacking one day, according to her declaration, after plaintiff sustained the injuries complained of, she filed suit in the Supreme Court of the District of Columbia to recover $25,000 damages from the defendant who was then, and for many years prior thereto had been, a practicing physician in the District of Columbia. The basis of her claim as set forth in the declaration, which is in two counts, is, according to the averments of the first count, that the defendant, on October 23, 1922, "negligently and carelessly injected and discharged into the ears and internal organs of the said plaintiff a solution which was harmful, dangerous and destructive of the tissues and drums of the ears, and which was not a solution used by physicians and surgeons in the exercise of such care as is usually used by practicing physicians and surgeons in this locality, to wit, in the District of Columbia, in the treatment of the ears," and, according to the second

count, that the defendant, on October 23, 1922, "negligently injected and discharged into the ears and internal organs of the said plaintiff a solution which was not sweet oil, but was a solution which was harmful and dangerous and destructive of the tissues and drums of the ears" (R., pp. 1-3).

The defendant, in his plea, alleged that the treatment complained of was given by him on October 20, 1922, and consisted in placing a drop or two of pure mineral oil in the external ear of the plaintiff. And for a further plea to the declaration, he alleged that the supposed cause of action on the part of the plaintiff did not accrue at any time within three years next before the commencement of the suit (R., 3-4).

The theory of the plaintiff at the trial was that an "acid" had been injected into her ears.

In support of her claim, plaintiff testified that on October 21, 1922, she first consulted the defendant for a trouble with her throat and received treatment therefor; that on the following Monday evening she again called upon the defendant, who advised her that mouth breathing had caused her sore throat and there was something wrong with her nose and she needed treatment, which he accordingly gave her. The following Wednesday evening she again went to the doctor's office and complained that she thought she had a little cold or wax or something in her right ear; that the defendant looked in her ear and suggested that he drop a little mineral oil in it, which he accordingly did; that after he dropped the mineral oil in her ear she could not explain to anyone the horror of it; that he put a

little silver instrument in her ear and used a dropper that he got from a little bottle on the cabinet (R., p. 17-18). That he inserted the dropper in her right ear and the very minute it went in the pain was horrible, she became dizzy and the room started going around and around. He then dropped some in her left ear, and as he did so she felt the same sensation and struck his arm away; it was terrible; no one knows what she went through. She heard a roaring noise; she does not know whether it was cannon shots or gun shots, but the noises were terrible. Immediately she became ill, lost control of her whole body. It was a couple of months before she could begin to hear any noise, as, for instance, riding on a street car and being able to hear the street car bell, or the telephone ring. She was totally deaf to all sound (R., p. 18). That at the time of testifying she could not hear at all with her right ear, and that in that ear she always has a terrible noise, a roaring noise that has never ceased, and that she hears what she hears with her left ear. On rainy or cloudy days her head feels clogged up and sounds are not as distinct as when the weather is clear (R., p. 19).

Though claiming to have suffered this very serious injury in October, 1922, with its consequent pain, suffering and total deafness in her right ear, and partial deafness in her left ear, she further testified that she first consulted a lawyer about the case in October, 1925 (R., p. 20).

In further support of her claim, plaintiff called as a witness Dr. Grover Bache Gill, a practicing physician

and surgeon in this District, who testified that he made an examination of her on February 28, 1927, nearly five years after the occurrence. At that time plaintiff told him she had had trouble with her ears and had had acid put in her ears in 1922, and complained of deafness. The examination disclosed that the eardrum of the right ear is practically gone and the one in the left ear between one-third and one-half is gone, and there was defective hearing in both ears (R., p. 21). Asked by counsel for the plaintiff what would cause the condition of the eardrums as he found it, the witness stated as follows: A good many things could cause it—a prolonged abscess of the ear following diseases of childhood, such as scarlet fever: infection; tuberculosis of the middle ear; syphilis of the middle ear; typhoid fever; mumps; most any exanthema; accident; sudden blow to the ear; anything that would destroy tissue (R., p. 22).

The witness further testified that the symptoms of Meniere's disease are cessation of hearing in either one or both ears, nausea, vomiting and vertigo. The symptoms are manifest instantly, as a rule, when the hemorrhage takes place in the inner ear. It is a disease of the inner ear (R., pp. 23-24).

On cross-examination the witness further testified that the condition of her eardrums could be caused by infection, by infection of the teeth, infection of the sinuses, and by catarrhal conditions; that he does not recall whether or not he made an examination of her nose to discover whether it had been or was a focus of infection; he made no examination of the plaintiff's

teeth for this purpose; nor of her sinuses; he made no blood test of the plaintiff, *and that from the examination he made and the history of the case as he got it from the plaintiff when she came to him, and assuming also all the facts contained in the hypothetical question put to him* (R., pp. 26, 27, 28) *to be true, and assuming further that the plaintiff's ear was in a perfectly normal condition in* 1922, *and that no focus of infection then existed in the teeth, sinuses, nose or throat* (R., p. 28), *he did not then reach a conclusion and has not as yet reached a conclusion in his own mind as to what caused her condition* (R., p. 27); that he knew nothing whatever about the condition of her nose, teeth, throat or sinuses in 1922 (R., p. 28). The only other medical testimony offered by the plaintiff was that of Dr Thomas B. Crisp, who testified that in 1923 he made an examination of the plaintiff's ears and one drum was apparently ruptured and there was scarred tissue on the other; the eardrum of the right ear was broken and the left ear was just inflamed; the eardrum in the right ear was about 50 per cent gone.

The position taken by the defendant in this case in the pleadings and at the trial was as follows:

First. The defense of the statute of limitations was a complete bar to a recovery.

In support of this defense the defendant offered the testimony of himself (R., p. 49), Miss Minnie Spitzer (R., p. 40), and Mrs. Agnes Gunning (R., pp. 44-45), and sought to offer in evidence the record made by him at the time the treatment was given, made in the

regular course of business, and in the presence of the plaintiff (R., pp. 50, 51, 52), which record the court excluded.

Second. That the eardrums of the plaintiff were not punctured or ruptured by any act of the defendant, but were already ruptured when she first came to visit him on the 13th day of October, 1922, for treatment for her throat. In support of this the plaintiff offered the testimony of himself, and sought to put in evidence a record made by him at the time of his examination of the plaintiff on that day in the regular course of business (R., pp. 50-53), which record the court excluded.

Third. That the injuries complained of by the plaintiff did not result from the defendant having placed in her ears any harmful or dangerous solution, but that at the time she received the treatment to her ears she was suffering from a sudden attack of Meniere's disease, and that the pain, suffering, dizziness, nausea, etc., which she suffered, according to her testimony, was a result of that disease. In support of this contention plaintiff offered the testimony of Miss Minnie Spitzer (R., p. 41) and Mrs. Agnes M. Gunning (R., pp. 44, 45), showing that immediately before going into the doctor's office for treatment plaintiff complained of terrible pain in her head, dizziness and nausea, and was vomiting. That these were symptoms of Meniere's disease was shown not only by the testimony of plaintiff's witness, Dr. Gill, above referred to, but by the testimony of Dr. Allen (R., p. 33) and the testimony of the defendant (R., pp. 53, 54).

In this connection defendant sought to offer in evidence a record made by him of the history of the case, showing a diagnosis of Meniere's disease and of the presence of such symptoms, a record made in the regular course of business at the time plaintiff was in his office and in her presence (R., pp. 51, 52), but the court excluded such record.

Fourth. That the condition of the plaintiff was not the result of some dangerous and harmful solution having been put in her ears, but was due to a chronic catarrhal otitis, probably due to two combined factors, one, poor ventilation of the nose, and, two, focal infection, most probably the teeth. In this he was supported by the testimony of Dr. Allen (R., pp. 31, 32), who also testified that his examination of the plaintiff and the history of her case, as given to him by her, showed that she had experienced great difficulty in breathing through the nose over a long period of years and an infection of her teeth, which, when extracted, were found to be abscessed teeth, and that she had a history of childhood diseases, including measles. Dr. Allen further testified that he found the greater part of the drum in the right ear, over three-fourths of it, and that the drum in the left ear was completely intact; that there was no evidence of scarring in the external canals of the ears and that a dropping of acid into the ears from a dropper would result in a burning of the tissues, a rotting away of the tissues and then scarring; that, according to plaintiff's statements to him, she did not hear well during rainy weather and on clear days she heard very much

better, which signified to him a catarrhal condition and that she was suffering from a catarrhal type of deafness (R., pp. 31, 32).

At the conclusion of the entire case, defendant moved the court to direct the jury to render a verdict in his favor, but the court overruled said motion (R., p. 59), and the case was submitted to the jury. The jury returned a verdict in favor of the plaintiff in the sum of ten thousand dollars ($10,000), upon which verdict judgment was entered.

From this judgment an appeal was prosecuted to the Court of Appeals of the District of Columbia. The action of that court is succinctly stated at the beginning of this brief.

Assignments of Error.

1. The trial court erred in permitting the witness, Dr. Grover Bache Gill, to answer the following question:

> "Is there any substance or liquid which, put in the ear, would destroy the tissue and destroy the ear drum?"

2. The trial court erred in permitting the witness, Dr. Grover Bache Gill, to answer the hypothetical question put to him, as follows:

> "Doctor, assume that Miss Cooley was about 22 years of age; that she had never complained of any pain or trouble with her ear; that she had had none of the diseases of childhood which had resulted in that acute condition of the ear,

pain or a discharge therefrom and had had no complaint, or had made no complaint of inability to hear, or of any defect in her hearing; that on this 25th of October, 1922, she attended a doctor, and that before he began a treatment, which was a treatment to her throat and nose, she told him that at that moment she felt as if there were some wax in her ear, it was stopped up a little, and asked him to look at her ear; that he looked at it through an instrument and said her ear was all right, but that he would put in a little mineral oil to loosen the wax; that he thereupon took with a dropper from a bottle of liquid and put it in her ear and immediately she suffered the sensations of agony and pain and roaring sounds and sounds of cannon, and that he persuaded her finally, in a short time, to permit him to insert some liquid in her left ear, and that she knocked his arm away after he had begun that insertion, and she experienced the same sensations in the left ear. That she became semi-conscious as a result of the pain and the noise that she was hearing, and was required to lie down for a period of at least two or three hours, and was then carried to a taxicab, was taken in a taxicab to her home and carried from the taxicab to her room and put to bed, where she remained for several days. Assume that at no time since then did she have any abscesses of the ear or diseases of the ears that resulted in the discharge of pus, and assume that from that time until shortly before the date of your examination that she had been attending the doctors, who had given her treatment in the form of something to relieve her pain; that her condi-

tion improved somewhat; that the deafness which she had first experienced totally for a while got better, so that she could hear better, and the pains did not continue to be so insistent, but that at times they would not be as severe, but that even to this day she has sounds in that ear, and assume that on the day of your examination you found her ear to be in the condition that you described, what, in your opinion, would be the cause of that?"

3. The trial court erred in overruling the defendant's motion to strike out the answer of the witness, Dr. Grover Bache Gill, to the hypothetical question.

4. The trial court erred in overruling the motion to strike out the answer of the witness, Dr. Grover Bache Gill, to the following question:

Q. "Now, Doctor, you said yesterday in your testimony that upon your examination you found that her eighth nerve was functioning properly, as well as it could be expected under the circumstances. Will you tell the court and jury what part the eighth nerve has to do with the ear, and what you referred to in that." A. "The eighth nerve is a nerve of hearing, and it is the nerve that transmits the sound. After it is received by the inner ear to the brain, it transmits the impulse. As a rule, if we have a case with a normal eighth nerve hearing, we usually can say without a doubt that the inner ear is perfectly all right, that there is no disease of the inner ear."

5. The trial court erred in refusing to admit in evidence the record card and report of Dr. Floyd McJ.

Allen, marked for purposes of identification "Allen Cross-examination Exhibits 1 and 2."

6. The trial court erred in refusing to receive in evidence the memorandum made by the defendant at the time of his examination of the plaintiff on October 13, 1922.

7. The trial court erred in refusing to admit in evidence the record of the history of plaintiff's case made by the defendant on October 20, 1922.

8. The trial court erred in permitting the witness Jonas M. Smith to answer the following question:

> "I will ask you whether or not on that occasion Dr. Patten directed the attention of Dr. Allen in his examination of Mrs. Stewart's ears and made the statement in the presence of Dr. Allen, as Dr. Allen was making his examination, words to this effect: 'You see that the right ear drum is practically all gone and that a part of the left is gone,' and Dr. Allen in reply said: 'Yes, I see.' "

9. The trial court erred in overruling the defendant's motion to direct the jury to return a verdict in favor of the defendant.

10. The trial court erred in refusing to grant instruction No. I, requested on behalf of the defendant.

11. The trial court erred in refusing to grant instruction No. III, requested on behalf of the defendant.

12. The trial court erred in its charge to the jury.

13. The Court of Appeals erred in affirming the judgment appealed from.

14. The Court of Appeals failed to make proper application of its own decisions, and of the decisions of this Court in accordance with the principles thereof.

15. The Court of Appeals wrongfully determined the powers and duties of a Trial Justice, and in so doing misapplied applicable decisions of this Court.

16. The Court of Appeals erred in assuming and holding that because there was some conflict in the testimony offered at the trial, the Trial Justice was bound to submit the case to the jury for its determination, even though a *"grave injustice"* might thereby result to the defendant, and a verdict against him, not based upon *"substantial issues of fact,"* but based upon *"mere caprice and sympathy,"* might follow such action on the part of the Trial Court.

I.

The Court Erred in Refusing to Admit in Evidence the Records and Memoranda of the Defendant and the Witness Allen.

The 5th, 6th, and 7th assignments of error relate to the refusal of the trial court to receive in evidence contemporaneous records and memoranda made by the defendant and by Dr. Floyd McJ. Allen, respecting the plaintiff, and they will be considered together.

When the defendant was upon the stand, he identified a written memorandum made by him on October

13, 1922, when he first examined the plaintiff (R., pp. 50-53). This memorandum showed that on that day plaintiff had a perforation of both eardrums, had received special treatment therefor, was very dizzy at times, and had a discharge from the right ear (R., p. 52).

The defendant testified that this memorandum was made at the time and that it was a memorandum such as he ordinarily made of exceptional cases. It was offered as a memorandum made at the time, in the regular course of the doctor's practice, and as a part of the *res gestæ*, but the court declined to receive it in evidence (R., pp. 50-53).

The defendant also identified a certain record made by him on the 20th day of October, 1922, containing a history of the plaintiff's case as given to him by the plaintiff, which record was made in the presence of the plaintiff, in the doctor's consultation room, where he examined her on that day. It was offered in evidence upon the same grounds as the previous record, but the court declined to receive it in evidence (R., p. 52). This history appears in the record at pages 52 and 53, and shows a diagnosis of Meniere's disease.

These records were offered in corroboration of the defendant's testimony and also as bearing upon the question of the statute of limitations.

The competency of such testimony is supported by the following decisions:

In Bean *vs.* Lambert *et al.*, 77 Fed., 862, objection was made to the introduction of certain books, on the ground that they had not been properly proved, but the court held:

> "There is nothing in the point that these books were not proven in accordance with the statutes of Minnesota relating to account books, as the books were not introduced for the purpose of proving any items of account. They were simply introduced as entries claimed to have been made at the times when the transactions actually occurred, and only for the purpose of corroborating the testimony of J. C. Norton as to the dates of those transactions, and were competent as entries purporting to have been made on those very dates."

And in Kamm *vs.* Rees *et al.*, 177 Fed., 15, 23, where objection was made to certain book entries on the ground that they were self-serving, the circuit court of appeals said:

> "(3) The entries were offered and received, not for the purpose of charging the defendant, but for the purpose of corroborating the plaintiff's testimony that credit was given to defendant and not to the Snake River Transportation Company. Book entries are often admissible for the purpose of corroborating a witness, although they may not be admissible as substantive evidence for the purpose of proving items of account."

The Court of Appeals in the case of Burson *vs.* Vogal, 29 App. D. C., 388, 392, has held that entries in a private diary were competent and admissible in corroboration of testimony. It became necessary for Burson to show the date of the conception of his invention. Burson testified as to certain dates and produced his private diary in corroboration. The Commissioner

of Patents excluded the diary, which was held to be erroneous.

The admissibility of these records is also supported by the following cases:

Cayton *vs.* English, 57 App. D. C., 324; 23 F. (2d), 745.

Insurance Companies *vs.* Weides, 14 Wall., 375.

Litteri *vs.* Freda, 241 Pa., 21.

Lapham *vs.* Kelly, 35 Vt., 195.

Taplin & Rowell *vs.* Clark, 89 Vt., 226.

In Ribas *vs.* Revere Rubber Co., 37 R. I., 189, the court refused to admit hospital record kept by an interne who testified at the trial. The court held the record should have been admitted and the refusal

> "deprives the defendant of the corroborative effect of the record upon the testimony of the witnesses in the event they were called and testified."

In Fennerstein's Champagne, 3 Wall., 145, 149, this Court says, regarding the competency of such testimony:

> "The rule rests upon the consideration that the entry, other writing, or parole declaration of the author was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates. In all he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. The rule is as firmly fixed as the

more general rule to which it is an exception. Modern legislation has largely and wisely liberalized the law of evidence. We feel no disposition to contract the just operation of the rule here under consideration."

See also:

Le Brun *vs.* Boston & Maine R. R., 83 N. H. 293.

While decisions to the contrary may be found, yet we believe that all of the authorities, when properly considered, indicate that the records of these doctors should have been admitted in evidence, for the following reasons:

1st. That "quantities and values are retained in the memory with great difficulty" (Insurance Companies *vs.* Weides, *supra*) is likewise true with respect to dates. A question in this case, of equal importance with the question of negligence, was the date upon which the plaintiff received her treatment. The record produced by the defendant was, according to the uncontradicted testimony, made on the day of that treatment, in the usual course of his occupation, in the presence of the plaintiff and showed the date of the treatment as of October 20, 1922.

2nd. The witness, Minnie Spitzer, testified that she was in the defendant's office on that day and saw the plaintiff there (R., p. 40). She paid a bill on that day and received from the defendant a receipted bill, which was received in evidence to corroborate her testimony

as to the date (R., p. 40). If this testimony was properly received in evidence to corroborate the testimony of one witness, we can see no good reason why it is not equally competent for the same purpose in so far as other witnesses are concerned.

Dr. Floyd McJ. Allen, a practicing physician and surgeon, was called as a witness on behalf of the defendant. He testified that on November 24, 1925, he made an examination of the plaintiff (R., pp. 30, 31). At the time of that examination plaintiff gave him a history or her case (R., pp. 30-31). Upon cross-examination he was asked and testified that he made a detailed written report of his examination and made a record of the examination at the time, on his usual history card covering the history of the case as given to him by the plaintiff (R., p. 34). He further testified on cross-examination that he did not bring the report or the record with him (R., p. 34). Much stress was laid by counsel for the plaintiff in his cross-examination of Dr. Allen, with respect to this record and report, as to what they were, how he made them, and why he had not produced them. Apparently this line of cross-examination was indulged in with a view either to discrediting the witness or to create in the minds of the jury an impression that, for some reason or other, Dr. Allen had an ulterior motive in not producing them in court.

Subsequently counsel for the defendant advised the court that he had obtained from Dr. Allen the report and record in question, and offered the same in evi-

dence (R., pp. 46-47), but the court refused to admit them in evidence, to which exception was duly noted (R., p. 47). The report and record appear in the record at pages 47 and 48.

Further, in connection with the competency of these records, the testimony in the case shows conclusively that there are many cases of perforated eardrums other than from the dropping of acid in the ear. Plaintiff's witness, Dr. Gill, said it might come from abscesses of the ear, childhood diseases, infection (R., p. 22), catharrhal conditions or from the teeth (R., pp. 26-27).

Dr. Allen testified that a perforation of the eardrum could be caused by impaired breathing, tooth infection (R., pp. 31-32), infection from colds (R., p. 33), abscess (R., p. 34), any childhood disease causing an infection of the middle ear (R., p. 34), colds, measles, or any acute head inflammation (R., p. 36).

Dr. Wells stated that a perforated eardrum was a common complication of measles (R., p. 43).

The plaintiff's history, as given by her to Dr. Allen for his record, admitted trouble with breathing, colds, ordinary childhood diseases, including measles and tooth infection (R., p. 48). Her history, given to defendant on October 13, 1922, admitted a discharge from one ear; the history obtained on October 20, 1922, admitted mouth breathing; *and she stated to defendant at that time that she knew both of her eardrums were perforated,* the right one more than the left (R., pp. 52-53). Though called as a witness in rebuttal, the plaintiff did not deny that she had told

the defendant when she first saw him that her eardrums were perforated (R., pp. 57-58).

We submit that the defendant was entitled to have these records submitted to the jury, records containing the history of the plaintiff's case, made up at the time, in the regular course of business, and in the presence of the plaintiff, in corroboration or impeachment of the oral testimony of the witness, as the jury might find.

Under the decision in Caton *vs.* English, *supra*, it is submitted these records and report were clearly admissible in evidence, and their exclusion was highly prejudicial to the defendant.

II.

The Court Erred in Permitting Dr. Gill to Answer the Hypothetical Question Propounded Him, and in Refusing to Strike out the Answer Thereto.

The second and third assignments of error relate to the hypothetical question asked Dr. Gill and will be considered together.

The hypothetical question propounded by plaintiff to her expert witness is the basis of two assignments of error; first, the action of the court in permitting the question to be answered; second, the action of the court in refusing to strike out the answer after cross-examination of the witness had developed certain facts with respect thereto.

The question is a lengthy one and appears in the record at pages 24 and 25. It first asks the witness

to assume that the plaintiff "never *complained* of any pain or trouble with her ear." What difference does it make whether plaintiff *complained* of any trouble with her ear or not? How can that fact be relevant or material to the issue involved here? *Non constat.* she may have had all sorts of pains in her ears, and trouble in her ears, which would clearly indicate to the medical mind that there was some disease or difficulty causing the pain and trouble. But the question limits the knowledge of the witness to the immaterial and irrelevant statement that plaintiff did not "complain," leaving the assumption that she did not, therefore, have any pain or trouble.

The question next asks the witness to assume that plaintiff "had none of the diseases of childhood which had resulted in that acute condition of the ear, pain or discharge therefrom." What acute condition was meant by "that acute condition"? Did it mean "not so acute that she *complained* of it"? Why was the doctor limited to "diseases of childhood" when other diseases, named by him as tuberculosis of the middle ear, syphilis of the middle ear, typhoid fever, mumps and any exanthema (defined by Webster as any eruptive disease, as measles), could have caused the perforation of the eardrums? And why were the diseases of childhood hedged about with the restriction of a "discharge therefrom" and "pain"? The testimony shows clearly that, if there had been an abscess, the ear would rupture and the pus would drain out, but that "it is not a running ear in the sense the patient tells of it, often the ear only runs for a few

hours'' (R., p. 34). And plaintiff's expert testified that if the rupture were caused by tuberculosis it might even be without pain (R., p. 22).

The doctor is then asked to assume that the plaintiff ''had had no complaint, or had made no complaint of inability to hear, or of any defect in her hearing,'' which again brings in the vice of the first matter he is asked to assume. Many people hear but poorly and defectively, but make no complaint about it because it is human nature to endeavor to hide such weaknesses.

Further, the doctor is asked to ''assume that at no time since then (the treatment by Dr. Gunning) did she have any abscesses of the ear or diseases of the ears that resulted in the discharge of pus.'' The absence of a discharge of pus is not an infallible indication that the physical condition of the plaintiff was not, of itself, the cause of the rupture of her eardrums. Dr. Gill's testimony shows that if any of the acute diseases of childhood had affected the eardrums there would be a discharge in the ear (R., p. 22), but he limits that to the *acute* disease of childhood; he does not in anywise explain how much of a discharge, or how long it would continue, and he carefully says later that it is ''usually'' that a discharge follows destruction of the drums by disease.

This question was objected to on the ground that it was incompetent, irrelevant, and immaterial; that it was objectionable as a hypothetical question; that it assumed important elements not appearing in the

testimony, and was intended to have the witness guess at something (R., p. 25).

The question asked, based upon the recitals contained in it, was "what, in your opinion, would be the cause of that"? and the answer was:

> "Why, she had to have *something* in there to destroy the eardrums. They were destroyed. My opinion is that they were destroyed by *something* that was put in the ear" (R., p. 25).

In the light of the testimony of this witness that at the time of testifying he had NOT "*yet reached a conclusion in his own mind as to what caused her (plaintiff's) condition*" (R. p. 29), and his further testimony, found at page 28 of the Record,

> "The putting of acids in the ear of the plaintiff would have practically the same effect on the external canal as it would have on the middle ear, if there was enough of it to hit on the side. In other words, if there was enough acid to go into the middle ear and fill it up, it would be bound to burn it as it went in. It would be destructive of the external canal, as it would be of the eardrum; there would be some tissue destroyed, undoubtedly. *When he examined the plaintiff he found the external canal in a normal condition.*"

we submit that this answer was a "*mere conjecture*" on his part, and therefore of no probative force, and incompetent (Gulf, &c. R. R. *vs.* Wells, 275 U. S., 455, 459).

We submit that, for the reasons pointed out, the question *was* irrelevant and immaterial, that it *was* objectionable as a hypothetical question, that it *did* assume important elements not in the testimony, and that it *was* intended to have the witness guess at something, and that, as a matter of fact, the witness, as indicated in his answer, *did guess.*

On the cross-examination of Dr. Gill it developed that in answering the hypothetical question he took into consideration the condition of plaintiff's eardrums and the condition of the middle ear as he found it at the time, and the condition of her hearing; *he also assumed that plaintiff's ear was in a perfectly normal condition in 1922, and that she had never had trouble previous to the time when Dr. Gunning put oil in her ear* (R., p. 28). *He also assumed that in October, 1922, no focus of infection, such as had been discussed, then existed* (R., p. 28).

None of these facts are supported by testimony; Dr. Gill knew absolutely nothing about the condition of plaintiff's nose, teeth, throat or sinuses in 1922; he made no examination of the sinuses, teeth or nose to see if they were, or had been, a focus of infection (R., p. 27). But his testimony was that infection is one of the causes of a perforated eardrum (R., pp. 26-27), and infection might be in the teeth, nose or sinus (R., p. 27).

The question as asked did not take into consideration any of the possible causes just enumerated, nor the possibility of an accident, such as a sudden blow (R., p. 23) or of any infection from a common cold.

A motion was made to strike out the answer to the hypothetical question (R., p. 29), but the motion was overruled.

We submit that the action of the court in overruling the motion and refusing to strike out the answer was improper, for the following reasons:

1. In answering the question the witness assumed facts not incorporated in the question, namely, that plaintiff's ear was in a perfectly normal condition in 1922; that there were no foci of infection in her teeth, nose, throat and sinuses; that she had no accident causing her condition; that she did not have tuberculosis or syphilis of the middle ear; that she had no disease which might have caused the perforation, without manifesting itself by a discharge from the ear.

> "Opinion evidence, to be of any value, must rest on a sound hypothesis, and if that is without support in the evidence, the opinion based thereon is without probative force."
>
> Nazzaro *vs.* Angelilli, 216 N. Y. S., 721.

2. In answering the question the witness took into consideration matters which he had learned when he made a private, *ex parte*, examination of plaintiff, namely, the then condition of her eardrums, and the then condition of her hearing, without knowing whether or not those conditions were identical with the conditions that existed in 1922.

3. The answer was a mere guess on the part of the witness in that it was based on conditions existing five

years after treatment by Dr. Gunning; in that the answer itself shows uncertainty, "she had to have *something* in there to destroy the eardrums"; and in that the doctor finally stated that he had not yet been able to reach a conclusion in his own mind as to the cause of plaintiff's trouble (R., p. 27), and, not having reached such conclusion for himself, he was manifestly not able to tell the jury what was the cause of the trouble.

The same situation existed in the case of Levy vs. Vaughn, 42 App. D. C., 146, where death occurred as a result of administering ether. No expert witness in the case could testify with certainty that the death did result by reason of the use of ether, and Mr. Chief Justice Clabaugh, in taking the case away from the jury, delivered an opinion which was approved by this court. During the course of that opinion the Chief Justice said, page 158:

> "Therefore, with the facts staring you in the face that nobody says to this jury that this intestate died from the effects of the ether, is it possible that the jury can say what the expert witnesses and all other witnesses in the case say that they cannot tell? Does the law mean that a jury can pass upon the cause of the death of a man, when those who ought to know cannot tell? The plaintiff's witnesses have said exactly the same thing that the witnesses for the defendant have said. Then, when all the witnesses concur in the statement that they cannot tell, on what theory of law can the court submit to a jury of twelve men, unlearned in the sciences, the ques-

tion of determining as to condition, when the experts themselves cannot tell?"

III.

The Court Erred in Permitting the Witness Smith to Answer the Following Question:

"I will ask you whether or not on that occasion Dr. Patten directed the attention of Dr. Allen in his examination of Mrs. Stewart's ears and made the statement in the presence of Dr. Allen, as Dr. Allen was making his examination, words to this effect: 'You see that the right eardrum is practically all gone and that a part of the left is gone,' and Dr. Allen, in reply, said: 'Yes, I see' " (R., p. 58).

Objection was made to this question on the ground that it was not proper rebuttal, that no foundation had been laid for it, and that it sought to get indirectly to the jury testimony that could not be given directly (R., p. 58), which objections, we think, were well founded.

When first placed upon the stand, Dr. Allen stated that he had examined the plaintiff on November 24, 1925, in Dr. Patten's office (R., p. 31); no reference was made in his examination-in-chief as to who was present or as to any conversation or remarks.

On cross-examination Dr. Allen was immediately asked to identify the persons present at the time of the examination, and then he was asked about a conversation, and stated that he did not remember Dr. Patten directing his attention and saying to him, "You

see, this eardrum is gone entirely and you see this other one is partly gone," and that he did not remember saying in response, "Yes, I see" (R., p. 33).

We submit that the question asked Dr. Allen was about a collateral matter, outside of the scope of the examination-in-chief, asked upon cross-examination, so that the plaintiff was bound by the testimony and had no right to impeach the witness.

Furthermore, we submit that the question asked Dr. Allen, "You see, this eardrum is *entirely* gone. You see this other one is *partly gone*" (R., p. 33) is entirely different from the question asked the witness Smith, "You see that the right eardrum is *practically all gone* and that a *part* of the left is gone" (R., p. 58), so that there was no proper foundation laid for the impeaching question.

Manifestly, such testimony could have no weight in the decision of this case. It was an attempt by indirection to get before the jury an alleged fact that could not have been introduced directly by reason of its incompetencey. Coming as it did at the last stage of the trial, it unduly and prejudicially appealed to the sympathies of the jury.

IV.

The Court Erred in Refusing Defendant's Request for Instruction No. III.

The defendant requested the following instruction to the jury, which was refused:

> "You are instructed that before plaintiff can recover in this case you must find: First, that

she sustained the injuries complained of in the declaration; second, that such injuries were caused by negligence on the part of the defendant, Dr. Edward J. Gunning; third, that such injuries were the natural and probable result of such negligence. If the plaintiff fails to establish any of these elements by fair preponderance of the evidence, your verdict must be for the defendant'' (R., p. 61).

It is submitted this requested instruction properly states a rule of law applicable to this case, and the defendant was entitled to have the instruction given in the simple, direct form in which it was presented, to guide the jury in their consideration of the case. The subject matter of this requested instruction was not covered by any instruction granted by the court (R., pp. 60, 61). It may be that by taking a word or phrase, here and there, from the charge of the court as a whole, this Court may find the principles of the requested instruction covered, but it could hardly be expected that a jury of untrained laymen could accomplish this feat.

Furthermore, in view of the state of the evidence in this case, we respectfully submit that if the requested instruction was sound, it should have been granted, to the end that counsel for the defendant might have properly presented its principles in his argument to the jury.

The refusal to grant the instruction was, we submit, prejudicial to the rights of the defendant.

V.

The Court Erred in Its Charge to the Jury.

This error alleged forms the basis of the twelfth assignment of error.

The charge of the court to the jury was quite a lengthy one and will be found in the Record at pages 62 to 72. In the course of his charge, after reviewing considerable of the testimony, the court stated to the jury:

> "And it is at this point, gentlemen of the jury, that the real question for solution arises. What did the Doctor put in her ear? Did he put into her ear anything that inflicted upon her the injury that she complains about here?"

and immediately following the court further stated:

> "Now, what is the fact? That is the crux of this case, gentlemen, on the question of alleged negligence of the defendant, but you must not guess what he did" (R., p. 69).

Irrespective of the fact that there was no direct proof that the defendant put any harmful solution in the ear of the plaintiff, how can it be said, in the light of the record in this case, that whether he did or not was the *crux* of the case and the *real* question to be determined? It seems to us that the question whether the alleged cause of action was barred by the Statute of Limitations was just as much a *real* question for the determination of the jury and constituted the crux

of the case as much as any other question. Likewise, the question of whether the plaintiff was at the time she received the treatment in question, suffering from an attack of Miniere's disease, was a *real* question for the determination of the jury. So, also, the question of whether or not the plaintiff's condition was consequent upon many of the other causes testified to by the witnesses that might be responsible for her condition, for many of which causes the defendant could in no wise be held responsible, was a *real* question for their determination and constituted as much a *crux* of the case as the question stated by the court. Again, the question whether the plaintiff's condition was due to a chronic catarrhal otitis, as testified to by Dr. Allen, was as *real* a question for the determination of the jury. Also, the question of whether, when plaintiff first consulted the defendant on October 13, 1922, her ears were then perforated, as testified to by him and as told him by the plaintiff, was a *real* question for the determination of the jury. Any one of these questions answered in the affirmative by the jury must necessarily have resulted in a verdict for the defendant, and yet we have the court, in its charge to the jury, singling out the one question, "What did the doctor put in her ear?" as the *real* question for solution by the jury, at the same time telling the jury that the solution of that question alone constituted the *crux* of the case.

It is difficult to imagine what could have been more harmful and prejudicial to the rights of the defendant than the language adopted by the court in its

charge to the jury, and the placing by the court of such undue emphasis upon this one question, with the statement that it was the real question for determination by the jury, to the exclusion of the many other questions which were equally important to be considered and determined by the jury, if the defendant was to be accorded a fair, impartial, and intelligent consideration by the jury of the case as an entirety, and of all of the questions arising upon the testimony adduced on both sides.

The court's attention was called to the matter before the jury retired to consider of its verdict, and ample opportunity afforded the court to clarify, explain, amplify or qualify the statement. The court did nothing, however, and permitted the case to go to the jury, content with reserving an exception on the part of the defendant to its action (R., p. 72). This, we submit, was error on the part of the court; and no argument is necessary to demonstrate that it was highly prejudicial to the rights of the defendant.

VI

The Court Erred in Overruling the Motion to Direct a Verdict in Favor of the Defendant and in Refusing Defendant's Request for Instruction No. 1.

This is covered by assignments of error nine and ten and is based upon the propositions, A, that the plaintiff failed to establish the negligence charged in the declaration and, B, the evidence showed that her condition may have resulted from any one of a number

of different causes, for some of which the defendant was in no wise responsible, and, therefore, the case should not have been submitted to the jury for a verdict which, if in favor of the plaintiff, must necessarily have been based upon speculation and conjecture.

A.

At the conclusion of the entire case the defendant moved the court to direct the jury to return a verdict for the defendant, the motion being based upon the fact that the plaintiff had failed to establish her case as laid in the declaration; that a verdict for the plaintiff would necessarily have to be based upon conjecture or guesswork; and that the testimony showed that the injury complained of might have resulted from many causes, for one or more of which the defendant could not be held liable (R., p. 59). The court overruled said motion and subsequently denied plaintiff's request for instruction numbered I (R., p. 60) to the effect that upon the whole evidence the jury were instructed to return a verdict for the defendant.

The negligence complained of by the plaintiff in the first count of her declaration was that the defendant put in her ears a *solution* which was harmful, dangerous and destructive of the tissues and drums of the ears (R., p. 1), and in the second count that the plaintiff injected into her ears a *solution* which was not sweet oil but was a solution harmful, dangerous and destructive of the tissues and drums of the ears (R., p. 3).

The only medical testimony offered by the plaintiff in support of these charges in her declaration is that of Dr. Gill.

It is a well-established principle of law that in cases such as this medical testimony is necessary in order to establish as definitely as possible for the jury the cause of the injury.

> "Only those are qualified to testify as to whether there was negligence in the method of treatment who themselves possess the skill required to administer such treatment, and to them the jury must listen."
>
> McCoy *v.* Buck, 37 Ind. App. 433.

> "It takes more than the opinion of one or more physicians or surgeons that the treatment followed in a given case should have been different to lay a foundation for malpractice."
>
> Gramaldi *v.* Zeglio, 3 N. J. Misc. R. 669; 129 Atl. 475.

The only expert witness offered by the plaintiff in support of her cause of action testified that he obtained a history of the plaintiff's case from her when she came to him; this history is known medically as subjective symptoms; and the witness usually regarded subjective symptoms in reaching a conclusion (R., p. 27). Considering all of the history the witness obtained from the plaintiff, and considering all of the knowledge that he had gained in an examination made of the plaintiff, and assuming the truth of all of the statements contained in the hypothetical

question which had been propounded to him, and assuming, in addition, that plaintiff had no form of infection, and assuming that the plaintiff's hearing was in a perfectly normal condition in 1922, and assuming that the plaintiff had no diseased condition of any kind which would cause a perforated eardrum, the witness, nevertheless, testified that at the time he examined the plaintiff *he reached no conclusion as to the cause of her trouble and that, as a matter of fact, he had not yet reached any conclusion in his own mind as to the cause of plaintiff's trouble* (R., p. 27). This, then, presents the same situation as existed in Levy *vs.* Vaughn, *supra,* where the Court affirmed a directed verdict for the defendant.

As we understand it, the office of expert testimony of the kind offered in this case is to show the jury that the condition complained of by the plaintiff is caused by the negligent act charged against the defendant. How can this testimony fulfill that office when the witness who gives it tells the jury that he has not "as yet reached a conclusion in his own mind" as to the cause of plaintiff's injury? If the witness has reached no conclusion for himself, he is manifestly unable to enlighten the jury and assist them in reaching the true conclusion.

Furthermore, if this expert in the light of all the facts before him and assumed by him as hereinbefore shown is unable to reach a conclusion as to the cause of plaintiff's injury, how can a jury of laymen reach a conclusion, except and only it be based upon speculation and conjecture?

B.

The testimony of all the expert witnesses in the case shows conclusively that there are many causes for the perforation of an eardrum, other than that claimed by the plaintiff to have been the cause in this case.

For the plaintiff, Dr. Gill testified that such a condition could be caused by a good many things; a prolonged abscess of the ear following diseases of childhood, such as scarlet fever; infection; tuberculosis of the middle ear; syphilis of the middle ear; typhoid fever; mumps; any exanthema (R., p. 22). An accident, a sudden blow to the ear, and anything that would destroy tissue would rupture the eardrum (R., p. 23). The rupture might be caused from an infection in the teeth (R., p. 27) or by a catarrhal condition or by an infected sinus (R., p. 27).

For the defendant, Dr. Allen testified that plaintiff's condition was caused from chronic catarrhal otitis, probably due to poor ventilation of the nose and infection in the teeth (R., pp. 31, 32). An infection in the head, such as a cold, could result in a ruptured drum (R., p. 32). If the plaintiff, in childhood, had suffered a disease which had caused an infection of the middle ear, the abscesses would form in childhood and the rupture of the drum would follow at the time of the abscess (R., p. 34). The breaking of such abscess would not mean a running ear in the sense the patient tells of it, for often the ear runs only for a few hours (R., p. 34). Secondary measles, an ordinary cold, or any acute head inflammation, could be the cause of plaintiff's condition (R., p. 36).

Dr. Wells testified that any inflammation that went to a suppurative stage was almost certain to produce a perforation of the eardrum; every child, for instance, who has had an abscess of the ear, it means that the drum membrane has become perforated (R., p. 42). Infection of the ear is a common complication of measles (R., p. 43).

Thus the testimony shows conclusively that there were a dozen or more possible causes for the perforation of plaintiff's eardrum. It, therefore, became necessary for her to demonstrate not only that the condition of which she complained was not due to any of these causes, but that it was due to the negligence of the defendant.

In Bennett *vs.* Washington Terminal Company, 55 App. D. C., 111, 113, where there was no definite testimony showing how decedent met his death, whether he was killed by a train of the Pennsylvania Railroad or by an engine of the Washington Terminal Company, the trial court took the case away from the jury on the ground that there was no basis upon which the case could have been submitted. The court, through Mr. Justice Van Orsdel, in affirming the action of the trial court, says:

> "No one saw Bennett struck. No one knows what he did after the time he was cut off from the view of the witness Arnold by the movement of the Pennsylvania train. Counsel for defendant advance the theory that he was in fact struck by that train and thrown on track 19, where he was run over by the shifting engine. This theory is as plausible as any other

that can be indulged in this case. To have left the question of defendant's negligence to the jury would have opened up an endless realm for speculation and conjecture, for the building of inference upon inference and presumption upon presumption.

• • • • • • •

"The presumption that the accident resulted from any one of these causes might be indulged. Where, as in this instance, the accident may have resulted from any one of a number of different causes, and in any one of a number of different ways, the court will not permit the jury to speculate as to how it occurred, and arrive at a verdict which at best would amount to a mere guess. It was incumbent upon the plaintiff to establish the negligence of the terminal company by affirmative proof."

This Court has laid down the same rule of law. In Patton *vs.* Texas & Pacific Railway Company, 179 U. S., 658, 663, the court said that

" • • • it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee

> is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In Matuschka *et al. vs.* Murphy, 173 Wis., 484, a malpractice case, the court said:

> "In order to recover against the defendant, the plaintiff must produce evidence from which the jury is justified in finding that it (plaintiff's condition) was due to the want of care and skill by defendant Stromberg. This burden is not met by showing it might have been the result of two or more causes, one of which was the defendant's unskillfulness. Verdicts must rest upon greater certainty."

The late Chief Justice Clabaugh, in an opinion in a malpractice case, approved by the Court of Appeals (Levy *vs.* Vaughn, *supra*), said:

> "You cannot hold people responsible by evidence upon which the jury can draw an inference only by speculation. It must be proof that is positive to such a degree as that the inference naturally arises. In this case we have nothing but speculation on that subject.

Of all the possibilities that might have caused plaintiff's condition, there is not a scintilla of evidence that she had not had typhoid fever, mumps, colds, scarlet fever, the latter branded by her own expert as one of

the most destructive forms of middle ear infection (R., p. 22).

Measles, with which a perforated eardrum is a common complication (R., p. 43), is negatived by the plaintiff with but little effect. Plaintiff's mother did not think plaintiff had measles, but she really did not remember, because she had seven children, some of whom did have the measles (R., p. 16). But plaintiff herself remembered having the measles, for she gave Dr. Allen a history of childhood diseases, including measles (R., p. 31).

No one testified that plaintiff did not have tuberculosis or syphilis of the middle ear; Dr. Gill made no blood tests and knew nothing about the condition of plaintiff's nose, teeth, throat or sinuses in 1922 (R., p. 27). But plaintiff again admitted dental trouble resulting in the extraction of a number of teeth about 1923, and at the time they were extracted they were abscessed teeth (R., p. 31), and the history card of Dr. Allen shows that the dentist was amazed to find so many teeth dead (R., p. 48).

Plaintiff herself, on October 13, 1922, gave the defendant a history of a discharge from the right ear (R., p. 52), and stated to Dr. Gunning that she knew her eardrums were perforated, the right eardrum being perforated more than the left (R., p. 53). Although the plaintiff took pains to deny many other statements made by Dr. Gunning in his testimony, there was no attempt to deny that she told Dr. Gunning that she had perforated eardrums when she first visited him (R., p. 58), the denials being limited by the plaintiff to the occasion of her last visit.

We submit that in this condition of the testimony it was the duty of the trial court to take the case from the consideration of the jury and not permit them to enter upon "an endless realm for speculation and conjecture, for the building of inference upon inference and presumption upon presumption." As said by this Court in Gulf, Mobile and Northern R. R. Co. *vs.* Wells, *supra:*

> "In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough."

VII.

The Opinion and Judgment of the Court of Appeals.

We do not deem it necessary to further argue the propositions set forth in the assignments of error numbered 13 and 14, but we wish to briefly consider the propositions contained in those numbered 15 and 16, which are as follows:

THE COURT WRONGFULLY DETERMINED THE POWERS AND DUTIES OF A TRIAL JUSTICE, AND IN SO DOING MISAPPLIED APPLICABLE DECISIONS OF THIS COURT.

THE COURT ERRED IN ASSUMING AND HOLDING THAT BECAUSE THERE WAS SOME CONFLICT IN THE TESTIMONY OFFERED AT THE TRIAL, THE TRIAL JUSTICE WAS BOUND TO SUBMIT THE CASE TO THE JURY, FOR ITS DETERMINATION, EVEN THOUGH A "GRAVE INJUSTICE" MIGHT THEREBY RESULT TO THE DEFENDANT, AND A VERDICT AGAINST HIM,

NOT BASED UPON "SUBSTANTIAL ISSUES OF FACT," BUT BASED UPON "MERE CAPRICE AND SYMPATHY" MIGHT FOLLOW SUCH ACTION ON THE PART OF THE COURT.

The basis of the opinion of the Court is that inasmuch as there was a conflict in the testimony of the witnesses the Trial Justice was bound, under the previous decisions of that court, to submit the case to the jury for its determination.

In the concurring opinion of Mr. Justice Van Orsdel he states he is *forced to this conclusion, notwithstanding his belief that a very grave injustice has been done in the case.* Apparently his opinion is based upon the theory that the Trial Justice *lacked the power to deal with the case in such manner as would prevent grave injustice* to the defendant, and, being a mere *automaton* he was compelled to leave the case to the decision of the jury even though, in so doing, his action would result in eliciting a verdict based, not upon *substantial issues of fact,* but rather upon *mere caprice and sympathy.*

The opinion in full is as follows:

> "I concur in the opinion affirming the judgment of the trial court. I am forced to this conclusion, notwithstanding my belief that a very grave injustice has been done in this case. Under the strict rule adopted by this court in the cases cited and relied upon by the Chief Justice in his opinion, there is in my judgment sufficient evidence to carry this case to the jury.
>
> "A motion for a directed verdict challenges the sufficiency of the evidence to take the case to the jury. It presents a question of law for the

trial court and the appellate court which alone can be determined by an analysis of the evidence. It is a mere travesty to say that the court is bound to send the case to the jury, if there is any evidence tending to support the contention of the plaintiff, and shut its eyes to the justice or injustice of a verdict resting upon such a flimsy basis. It is my fixed opinion, as expressed on many occasions, that the rule established in the decisions referred to, and in many other decisions of this court, is too strict and should be modified to the extent of confiding in the court the power to determine whether or not the evidence is sufficient to raise a reasonable issue of fact, capable of supporting a verdict that will meet the substantial ends of justice.

"I trust that such a rule of procedure may yet be adopted by the unanimous concurrence of the justices of this court, as will lift the trial justice in this District from a mere automaton to the exercise of his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure as will elicit verdicts based upon substantial issues of fact rather than mere caprice and sympathy."

We quite agree that by the verdict and judgment in this case a *grave injustice* was done the defendant. We likewise agree that such verdict was not based upon the determination of *any substantial issue of fact.* We assert that its only basis was *"mere caprice and sympathy."*

With profound respect for the opinion thus expressed we respectfully submit the adoption of any such rule is unnecessary. Trial Justices, according to

the decisions of this Court covering a long period of time, hereinafter referred to, not only have such *power*, but the *duty of exercising such power* rests upon them. If any Trial Justice in this District functions as a "*mere automaton*" he does so for one of two reasons:

1. Because he fails to realize the power vested in him, and the duty resting upon him by virtue thereof, or,

2. Realizing the power thus vested in him, and cognizant of such duty, he neglects to exercise the power and perform the duty.

As far back as the case of Pleasants *vs.* Fant, 22 Wall., 116, this Court, in unequivocal terms, defines the duty of the trial court as follows:

> "It is the *duty of the Court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.*" * * *
>
> "In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide *whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor.*" (Italics ours.)

Again says this Court in the case of Patton *vs.* Texas & Pacific Ry. Co., 179 U. S., 658, in speaking with reference to the powers and duty of the trial judge:

> "At the same time, *the judge is primarily responsible for the just outcome of the trial.*

> *He is not a mere moderator of a town meeting,* submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, *but one who in our jurisprudence stands charged with full responsibility."* (Italics ours.)

The most effective way of exercising this power and performing this duty by trial judges is for them to determine "whether or not the evidence is sufficient to raise a responsible issue of fact capable of supporting a verdict that will meet the substantial ends of justice."

We admit that in the case at bar there was a conflict of testimony. But we do not admit that there was any substantial conflict of testimony with respect to any substantial or controlling issue in the case. We do not deny the general rule laid down in the authorities referred to in the majority opinion of the Court. We respectfully deny its applicability to the case at bar, as it appears from the record. It is not every case where there is a conflict of testimony that should be submitted to a jury for determination. If that were so the power vested in trial judges and the duties resting upon them, as defined by this Court, are meaningless.

It is only where there is a substantial conflict of testimony respecting substantial and controlling issues of a case, and only where the state of the testimony would warrant or justify a verdict accordingly as the jury might determine the right and truth of such conflicting testimony, and where a verdict thus found

would do substantial justice between the parties, that the court is justified in submitting a case to the jury for its determination. But where the state of the testimony is such that "grave injustice" to a party may result from a verdict or where a verdict may follow based upon "mere caprice or sympathy" the trial judge is never justified in letting the case go to the jury. *The trial judge stands charged with full responsibility to protect parties litigant against such results.*

In the case of Pleasants *vs.* Fant, *supra,* this Court in discussing the duty of the trial judge to decide whether the plaintiff has offered evidence *sufficient to support a verdict in his favor,* the Court says the question is:

> "Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force to which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? * * * Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial granted? Such a proposition is absurd, and accordingly *we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff,*

the court should say so to the jury." (Italics ours.)

In speaking of the power of trial judges to direct verdicts and the duty of the court so to do, it is said in Oscanyon *vs.* Arms Co., 103 U. S., 261:

> "The practice is a wise one, it saves time and costs; *it gives a certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the court.*" (Italics ours.)

See also:

Randall *vs.* B. & O. R. R. Co., 109 U. S., 478.
District of Columbia *vs.* Moulton, 182 U. S., 576.
Famous Smith *vs.* United States, 151 U. S., 55.

In Improvement Company *vs.* Munson, 14 Wall., 442, it is said:

> "*Nor are judges any longer required to submit a question to a jury merely because* SOME *evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge,*

not whether there is literally no evidence, but whether there is any upon which a jury CAN PROPERLY PROCEED *to find a verdict for the party producing it, upon whom the onus of proof is imposed.*" (Italics ours.)

In Bowditch *vs.* Boston, 101 U. S., 16, it is said:

"It is now the settled rule in the courts of the United States that whenever, in the trial of civil cases, it is clear that *the state of the evidence* is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, *it is the right and duty of the judge to direct the jury to find according to the views of the court.* Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." (Italics ours.)

In *Commissioners, etc., vs. Clark,* 94 U. S. 278, it is said:

"*Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.* Ryder *vs.* Wombwell, Law Rep. 4 Ex. 39.

"*Decided cases may be found where it is held that if there is a* SCINTILLA *of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have es-*

tablished a more reasonable rule, to-wit, that, before the evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can PROPERLY *proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.''* (Italics ours.)

In Coughran *vs.* Bigelow, 164 U. S. 301, it is said:

> "The foundation for those rulings was not in the constitutional right of a trial by jury, for *it has long been the doctrine* of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed, and that, *if the evidence be not sufficient* to warrant a recovery, IT IS THE *DUTY of the court to instruct the jury accordingly,* and, if the jury disregard such instruction, to set aside the verdict." (Italics ours.)

We respectfully submit in the light of these authorities and in view of the state of the record in the case, the trial court was imposed with the duty of directing a verdict in favor of the defendant. It had the power so to do and thereby protect the defendant from "grave injustice" and a verdict based, not upon substantial evidence establishing the charges made against him, but upon "mere caprice and sympathy." Having failed to exercise this power and to perform this

duty it was within the power of the Court of Appeals and the duty was imposed upon it, to correct this error and to right the wrong consequent upon it.

We have a determination of one Justice that "there was no basis whatever for the verdict and judgment." We have also the determination of another Justice, "that a very grave injustice has been done in this case," evidently founded upon the conviction that the verdict of the jury was not based upon the determination of any "responsible issue" in the case, but rather upon "mere caprice and sympathy"—a verdict that does not "meet the substantial ends of justice."

In this situation it is respectfully submitted this case should be determined according to the broad principles of justice and fairness laid down and consistently followed by this Court in the foregoing cases, rather than upon the strict and narrow rule laid down in the opinion of the Chief Justice filed herein. If this latter rule is to prevail we unhesitatingly say, as did Judge Thayer in Haire *vs.* Reese, 7 Phila., 140:

> "* * * God forbid that the law should apply any rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession."

In conclusion we ask:

Has it come to pass in the administration of justice in our courts that a judge presiding at the trial of a cause, charged with full responsibility of seeing that substantial justice is done between parties litigant, is bound to take an action which may result in a "*grave*

injustice" to one of the parties, and which may elicit a verdict based upon *mere caprice and sympathy?*

Is a Justice of an Appellate Court reviewing such action of a Trial Justice forced to affirm it, notwithstanding he believes, and says, a grave injustice has been done in the case?

> "* * * Two wrongs never make a right, and two errors cannot correct a defective record." Van Orsdel, J., in Pickford *vs.* Hudson, 32 App. D. C., 480, 488.

It is respectfully submitted the judgment in this case should be REVERSED.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

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FEB 2
CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 31

EDWARD J. GUNNING, *Petitioner,*

vs.

GERTRUDE L. COOLEY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALVIN L. NEWMYER,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 672.

EDWARD J. GUNNING, *Petitioner*,

vs.

GERTRUDE L. COOLEY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

No Constitutional question is involved in this case, nor does it involve any question of general importance, nor is it a case in which the Court of Appeals of the District of Columbia has failed to give proper effect to applicable decisions of this Court.

On the contrary it is an ordinary negligence action against a physician in which the issues as to negligence were duly submitted to the jury under correct instruc-

tions given in accordance with well established principles of law repeatedly declared by this Court. The opinion of the Court of Appeals is now reported in 57 Wash. Law Reporter 82.

The specifications of alleged error all relate to the question of the sufficiency of evidence for submission to the jury. This question was not only considered by the trial Court on motion for a new trial but also by the Court of Appeals of the District of Columbia upon lengthy briefs and oral argument, and thereafter again by the Court of Appeals upon motion for a rehearing filed by petitioner supported by another brief. The motion for a rehearing was duly denied.

STATEMENT OF THE CASE.

The Chief Justice of the Court of Appeals, in the opinion rendered in this case (Record 73) recites a detailed and careful analysis of the material facts, so that it is needless to re-state them in this brief.

In several important particulars, the alleged summary of expert testimony contained in petitioner's brief, on page 9, omits material testimony in the record, and is also somewhat misleading in the following important particulars.

1. The plaintiff's expert, in stating that he had not made up his mind as to the cause of the injury, was referring to the fact that *from his examination alone*, he had not formed an opinion, but the expert opinion he expressed at the trial was based not only upon his own examination, but upon the facts shown by the other testimony, which he was asked to assume. As the trial Judge stated, (R. 30): "With respect to the last stated ground, not having formed any conclusion in his own mind as to the cause, I understand his tes-

timony to be that he has not formed any conclusions in his own mind as the result of his examination; that opinion is expressed in the answer to the hypothetical question, which was an opinion based entirely upon facts that he was asked to assume in that question." To the same effect, the opinion of the Chief Justice of the Court of Appeals in referring to the same matter (R. 75) states: "But in answer to a hypothetical question based upon his examination, together with the evidence submitted, on behalf of plaintiff, he gave his opinion as follows: 'Why she had to have something in there to destroy the eardrums. They were destroyed. My opinion is that they were destroyed by something that was put in the ear.' " (R. 26.) Therefore, the assertion by petitioner that plaintiff's expert "with all of the knowledge that had come to him," had not made up his mind, is an incorrect assertion contrary to the record.

2. Likewise, the second assertion by petitioner that "if acid had been placed in the ears of the plaintiff sufficient to have caused the injury complained of, there would *necessarily* have followed an injury to the external canals of the ear," is contrary to the record, as the testimony shows (R. 29) that plaintiff's expert testified, "It is possible to put a dropper and by the use of a dropper to insert it into the ear until it reaches the eardrum; and if a dropper is inserted into the ear far enough, until it is about to touch the drum, and strikes the drum and none of the acid strikes the parts before you get to the drum, it would not cause any burn" (to the external canal of the ear).

3. Finally, the third contention made by petitioner, that the condition of plaintiff's ears was due to a chronic catarrhal otitis, was merely the opinion of

one of defendant's experts, contradicted not only by plaintiff's expert, but by the testimony of the defendant himself, who attributed the condition of her ears to a rare disease of the inner ear, known as Meniere's disease, although the injury in this case was to the middle and not to the inner ear (R. 55) and none of the other experts on either side attributed her condition to that cause. (R. 40.)

It therefore appears that there was conflicting testimony raising issues of fact, which it was peculiarly the province of the jury to decide. The trial Judge, who had the opportunity to see and observe the witnesses and to review the jury findings on a motion for a new trial, in a memorandum opinion (R. 5-6) duly overruled the motion after careful consideration, and the Court of Appeals upon a careful review of the record, affirmed the judgment.

ARGUMENT.

Petitioner, at page 15 of his brief, admits there was a conflict of testimony, but denies there was a substantial conflict with respect to any substantial issue, but the record discloses that there was a sharp conflict between the medical experts and also as to other substantial facts of the case, and the evidence was sufficient to convince the jury, the trial Judge, and the majority of the Court of Appeals, although one of the Judges, had he sat as a juror and a trier of the facts, might have decided the facts differently; but this does not change or alter plaintiff's right to a trial by jury.

On an application for certiorari, this Court has frequently held that the interpretation of "involved statement of facts, which are somewhat contradictory in character," is peculiarly the province of the jury, and

the jury's finding of fact will not be disturbed where the facts and circumstances are disputed.

Boehmer vs. Penna. R. R. Co., 252 U. S. 496.
Workman vs. N. Y., 179 U. S. 552.

This Court has already considered the question of the liability of a physician for malpractice, and Federal reports contain many decisions to the effect that evidence of negligence must be shown and the issue submitted to the jury.

Sweeney vs. Erving, 228 U. S. 233, 57 Law Ed. 815.
Laughlin vs. Christensen, 1 Fed. (2nd) 215.
Vergeldt vs. Hartzell, 1 Fed. (2nd) 633.

In the quotation from the case of Levy vs. Vaughn, 42 App. D. C. 146, 158, at page 10 of petitioner's brief, it omits from said quotation, the very important preceding paragraph which reads, in part, as follows: "There is no evidence in the case to show, and nobody says that he died from the ether." In the case at bar there was expert testimony that plaintiff's ear drums were "destroyed by something that was put in the ear;" in other words, the evidence lacking in the former case did exist in the pending cause.

It has never been contended by respondent that a judge acts as a mere automatom, and it is conceded that where the evidence is insufficient to support a verdict, the court has the right to set it aside; but where, as in this case, there is substantial, although somewhat conflicting, evidence that the injury to the plaintiff was the result of defendant's negligence in using an unclean and acid-tainted dropper to insert an oil in her ear, or in negligently inserting an acid in-

stead of an oil, issues of fact are clearly raised and under well-established decisions of this Court should be submitted to the jury.

Applying the test, "where reasonable men may differ in their interpretation of testimony," that the question is then one for the jury, how can it be said that reasonable men may not differ under the evidence in this case, when the record shows that the evidence offered on behalf of the plaintiff convinced twelve jurors, a trial Judge, and a majority of the Judges of an appellate Court?

The cases cited by petitioner are therefore without application, as the law is well-established by an unbroken line of authorities that where a cause depends upon the effect and weight of testimony, it should not be withdrawn from the jury where a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not.

As this Court said in the case of Hickman vs. Jones, 9 Wall. 197, 201; 19 Law Ed. 553:

> "In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The

jury should take the law as laid down by the court and give it in full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law."

Texas and P. R. Co. vs. Gentry, 163 U. S. 353; 41 Law Ed. 350.
R. R. Co. vs. Ives, 144 U. S. 408; 36 Law Ed. 485.
Texas and P. R. Co. vs. Carlin, 189 U. S. 354; 47 Law Ed. 849.
Maraude vs. Texas & P. R. Co., 184 U. S. 173, 183; 46 Law Ed. 487.
Charter Oak Ins. Co. vs. Rodel, 95 U. S. 232; 24 Law Ed. 433.
Barney vs. Scheimer, 9 Wall 248, 19 Law Ed. 648.
New Jersey R. Co. vs. Pollard, 22 Wall 341; 22 Law Ed. 877.
Moulor vs. American Life Ins. Co., 101 U. S. 708; 25 Law Ed. 1077.
Weightman vs. Washington, 1 Black 39; 17 Law Ed. 52.
Richardson vs. Boston, 19 How. 263; 15 Law Ed. 639.
Richmond & Danville R. R. vs. Powers, 119 U. S. 43; 37 Law Ed. 642.

CONCLUSION.

It is evident from the foregoing that the reasons assigned by petitioner to entitle it to the extraordinary relief of certiorari are without merit, that the Court of Appeals of the District of Columbia in its careful and well considered opinion has followed the prin-

ciples of law clearly established by this Court, that the issues of fact were peculiarly within the province of the jury and were submitted to the jury under correct and fair instructions as to the law, and that no valid ground is presented for the allowance of the Writ of Certiorari and the petition should be denied.

ALVIN L. NEWMYER,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 31.

EDWARD J. GUNNING, *Petitioner,*

vs.

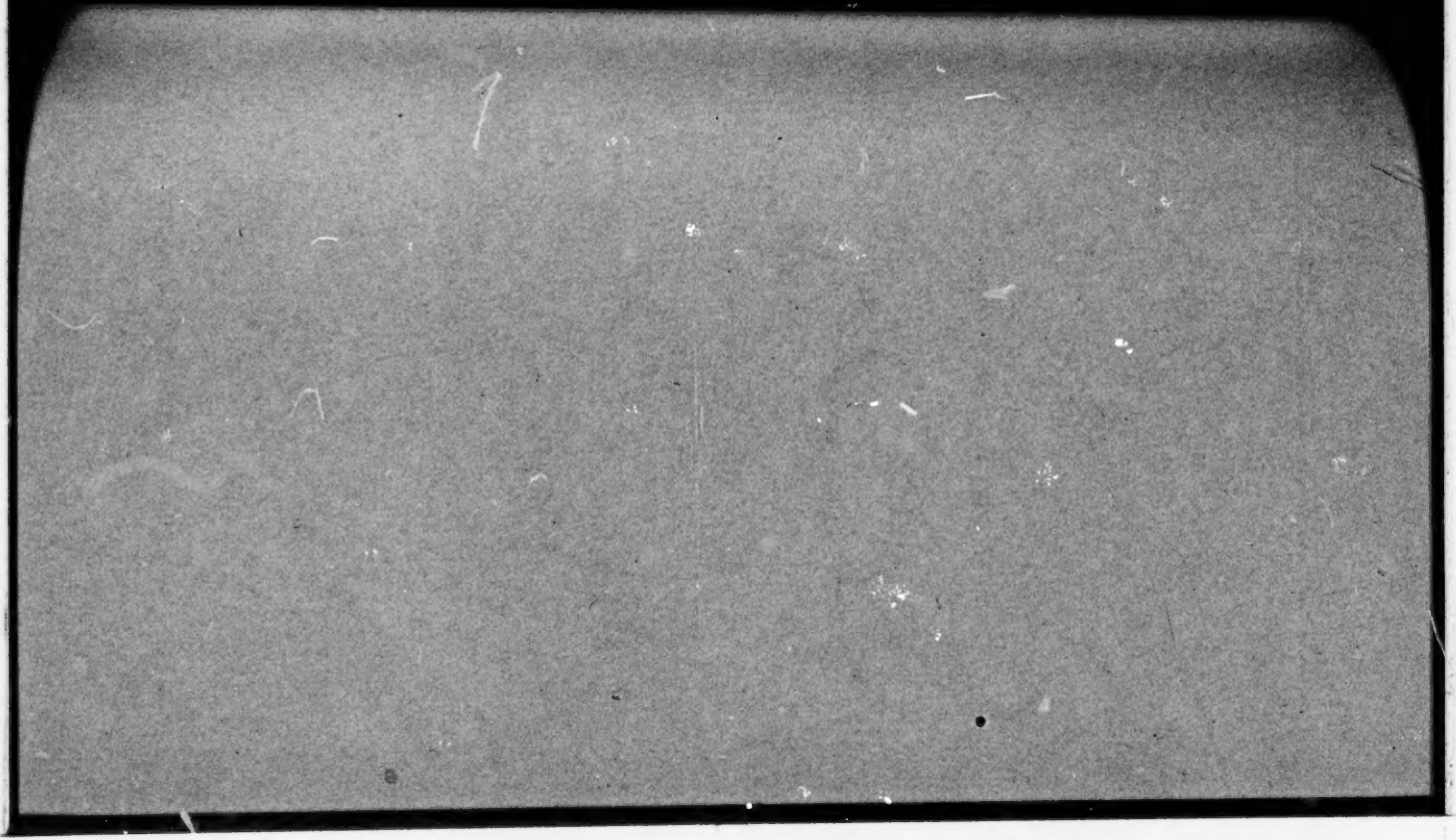
GERTRUDE L. COOLEY.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF ON BEHALF OF RESPONDENT.

ALVIN L. NEWMYER,
RALPH A. CUSICK,
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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GERTRUDE L. COOLEY.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF ON BEHALF OF RESPONDENT.

Respondent was the plaintiff and the petitioner was the defendant in the trial court, and they will be referred to as such in this brief.

The action was to recover damages for personal injuries which the plaintiff alleged she sustained by reason of the negligent medical treatment rendered her by the defendant. The case was submitted to the

jury upon the conflicting testimony, after a comprehensive and correct charge to the jury by the trial court. (R. 61-72) The jury returned a verdict in favor of the plaintiff. A motion for a new trial, which challenged the sufficiency of the evidence as well as alleged newly discovered evidence, was duly argued and overruled, the trial justice filing a written memorandum opinion (R. 5-6) effectively disposing of defendant's contentions.

Upon appeal, the judgment was affirmed by the Court of Appeals of the District of Columbia. The majority opinion written by the Chief Justice (R. 73-79) contains a careful and well considered review of the salient testimony and of the authorities, disposing upon reason and authority of the various contentions made by the defendant at that time and now repeated in his brief filed in this court.

It is true that one of the Justices of the Court of Appeals who concurred in the opinion affirming the judgment, voiced his personal disapproval of the rule of law, long established, whereby issues of fact, when fairly raised, are to be submitted to the jury, and it is also true that one of the Justices of the Court of Appeals dissented from the judgment and asserted that there was no basis for the verdict. A reference to very important testimony apparently not fully considered by the dissenting Justice will be referred to in this brief under the proper assignment.

With due deference to the several individual opinions of the Justices of the Court of Appeals and to the profession of medicine, it is respectfully submitted that a careful reading of all of the testimony in this case will disclose a fact that was apparent to the jury and trial justice who heard and observed the witnesses;

namely, that the defendant failed to exercise that reasonable degree of care which a physician, under the circumstances, should have exercised, and that by his reckless disregard of professional duty he perpetrated a cruel and painful injury to the plaintiff that, in the language of the trial justice, "is incurable." (R. 6)

STATEMENT OF THE CASE.

Plaintiff's proof tended to show that the defendant negligently injected an acid instead of mineral oil into her ears, as a result of which her right ear-drum was practically all destroyed and her left ear-drum partly destroyed, with consequent permanent impairment of hearing.

Defendant in his plea admitted that he had inserted a liquid in her ear, but claimed it was a pure mineral oil. One of plaintiff's witnesses, a lawyer whom she had consulted in September or October, 1925, testified that defendant telephoned him in reply to a letter presenting claim on behalf of plaintiff and denied that he had ever treated her ears or inserted any solution at all in the ear (Record 31), whereas defendant on the witness stand testified that he did not recall exactly the conversation with the lawyer but remembered that he did have a conversation. (R. 54.)

The record shows without contradiction that, although the physician had twelve or thirteen bottles on his medicine cabinet, he used the same dropper for all of his liquids (R. 55-6), and all of the bottles were similar in appearance. (R. 19.)

Defendant on his own behalf intimated that on the occasion of her visit to his office plaintiff had suffered an attack of a rare disease known as Menieré disease,

but none of the medical experts produced on his behalf or otherwise, expressed the opinion that she had Menieré's disease. The medical testimony also established, without contradiction, that Menieré's disease is a disease of the internal ear (R. 24), whereas the injury to the plaintiff was to the middle ear. (R. 27, 36.)

Plaintiff proved by numerous witnesses that her ears before the accident were normal and that she never had any infection or disease of the ear or deafness. (R. 12-18.)

It was conceded by all of the medical experts that the destruction of the ear-drum, if it did result from disease of any kind, would only so result because of infection, which would form an abscess in the ear, that on rupture would cause a perforation of the ear-drum, followed by discharge of pus. The history of plaintiff from childhood showed that she never had an infected, diseased, abscessed or discharging ear (R. 16-17). The plaintiff's narration of what happened when the acid was injected (R. 18-19) is remarkably like the description of sensations predicted by the medical experts from such an experience. (R. 24.)

Plaintiff was home in bed from the Wednesday evening of the occurrence, October 25, 1922, until the following Friday, October 27, 1922, and that evening, after efforts failed to have the defendant come to see her and give her treatment (R. 16) she went under treatment of Dr. Patten, an ear specialist (R. 15, 20) and was treated by Dr. Patten every day for nearly two months and then three days a week and later twice a week, and Dr. Patten continued to treat her until October, 1926, for a continuance period of four years (R. 20) until he went away. It was conceded by coun-

sel for the defendant that it was impossible to produce Dr. Patten as a witness at the trial (R. 29). He had suffered a nervous breakdown and was then in a sanitarium.

Dr. Patten's qualifications as an ear specialist were recognized by Dr. Gunning, the defendant, because defendant testified it was he who had referred plaintiff to Dr. Patten (R. 54-56) but in this as in other details, he was overwhelmingly contradicted by the testimony of the plaintiff and other witnesses. (R. 16, 17, 19.)

Defendant also pleaded the Statute of Limitations, contending that his treatment was given October 20, 1922, the action having been filed October 22, 1925, but the plaintiff proved by numerous witnesses that the negligent treatment was given October 23, 1922, the date being especially remembered by plaintiff's witness Brill (R. 12) whose birthday, was the day she had accompanied plaintiff on the occasion of her first treatment, Saturday, October 21, 1922.

The trial Court in its charge to the jury specifically instructed the jury on both the issue as to negligence and as to the Statute of Limitations. (R. 61-72.)

ARGUMENT.

I.

The Rejection of the Records and Memoranda of the Defendant and Witness Allen was Proper.

On pages 50 and 51 of the record the proceedings are detailed when the trial court excluded a memorandum made by defendant on a fly leaf of a Federal Narcotic record book, October 13, 1922, part of which record the Doctor himself admitted, he could not read. Counsel for defendant contended it was a record made in the regular course of his business but the witness himself on page 52 of the record admitted that it was not, but "Just in exceptional cases concerning exceptional cases," or in other words in certain instances.

This alleged record was plainly not a regular record made in the regular course of his business but, as the trial court stated, a self serving declaration not an account book and not an entry in the usual course of business (R. 51) and certainly no part of the *res gestae*. Moreover every readable statement it contained was testified to orally by the witness.

The alleged record dated October 20, 1922, made by the defendant on a piece of paper was equally inadmissible as not coming under any exception to the hearsay rule and not being used to refresh the recollection of the witness who testified that he remembered its contents very well without the memorandum (R. 52) and as a matter of fact testified orally to every alleged fact contained in the written memorandum including not only what he claimed to have found on his examination on that date but also as to the date on which the examinations occurred.

The trial court also properly excluded the history

card and copy of report made by Dr. Allen to defendant following his examination of the patient November 24, 1925. Doctor Allen testified in detail as to every finding contained in the report, in his oral testimony and did not require the memorandum to refresh his recollection, nor was the production of the history card and report called for by the plaintiff. The correctness of the trial court's ruling in this matter will clearly appear by an examination of pages 46 and 47 of the record.

The cases cited by defendant in support of his contention that the record and memoranda of the defendant and the witness Allen should have been admitted in evidence have no direct application to the case at bar.

The records and the memoranda offered in this case were manifestly not books of account kept in the ordinary course of business, but were entries merely of a casual transaction not in the regular course of business of the party, as admitted by the witness himself, and therefore of no evidential value in this case.

The trial court examined the narcotic book upon the fly leaf of which the solitary entry in this case appears, as well as the paper purporting to be the defendant's report of his interview and examination of the plaintiff on October 20th, and the record shows the trial court's comment on the inadmissibilty of said records at the time. (R. 50-52.)

It has been held that a trial court has discretion regarding the admission of such papers where there is any question of their regularity or suspicion as to their accuracy.

The case of Burson vs. Vogel, 29 App. D. C. 388, 392, cited by defendant involved entries in a private

diary kept by a party to the cause for 50 years regularly, containing dates and memorandum of work done on a complicated invention and this court said that such a record could be used by the witness to refresh his recollection on the details.

In Fennerstein's Champagne, 3 Wall. 145, 149, also cited, the question at issue was the market value of wines in France and it was held proper to admit letters from various dealers written in the course of their duties as bearing on the question of market value.

In Cayton vs. English, 56 W. L. R. 6, it was held merely that a medical report made by the defendant to the physician who had referred the plaintiff to him for treatment was part of the transaction or *res gestae*.

The cases of Bean vs. Lambert, and Kamm vs. Reese, which incidentally have never been cited in any later federal cases, involved actions of debt.

In the Encyclopaedia of Evidence, Volume 2, Page 626, the principle here applicable is clearly stated as follows:

> "The book is not admissible where the entry is but a casual transaction, not in the regular course of business of the party, nor where there is entered but a single transaction."

Regardless of conflicts in various state courts, the law in Maryland, adopted by this jurisdiction is clearly set forth in Romer vs. Jaecksch, 39 Md. 585, 589, as follows:

> "In this state the rule of the common law has not been departed from, and it has been held to apply only to entries made by a clerk or other disinterested party; here the entries in question are those made by the deceased parties, a party

> to the transaction, having a direct interest in the subject matter, and therefore, not within the rule above stated."

This principle was discussed and affirmed in the recent case of Cohen vs. Bogatzky, 149 Md. 134, 139.

In the case at bar these memoranda were offered both as a record in the regular course of the doctor's practice and as part of the *res gestae* (R. 52) and the memorandum dated October 20th, 1922, purporting to be the history taken by him on that date, was offered as a record made at the time in the course of the doctor's practice, as a part of the *res gestae* and as admissions on the part of the plaintiff. (R. 52.)

In neither case was the record or memoranda of defendant offered as corroborative evidence of the date on which he made his examinations with reference to the issue as to the statute of limitations, and he cannot now urge their admissibility on that ground as he seeks to do on page 13 of his brief.

In re estate of Fulton, 178 Pa. 78, 35 L. R. A. 133, 134, which was an action involving the admissibility of a physician's book, the court said:—

> "But there is an insuperable objection in the present case, that the book is not one of entries in the regular course of business. It is a separate book, containing no charges, except against the decedent."

In Richardson vs. Emery, 23 N. H. 220, 223, the court said:

> "The ruling of the court in this case rejecting the book was correct. There is no principle on which such extremely loose papers as those of-

fered by the plaintiff are admissible in evidence, as a book of accounts. They do not possess that intrinsic evidence of their truth, without which the admission of account books is extremely dangerous to the cause of justice. * * * It would be much easier to manufacture a book containing the plaintiff's statement of a single transaction than a regular account book containing the minutes of his business from day to day.'

In Stuckslager vs. Neel, 123 Pa. 53, 60-61, the court said:

"The rule is perfectly familiar, and is illustrated in the case of Shoemaker vs. Kellogg, 11 Pa. 310, in which we held that books of original entry are not evidence of the casual sale of an article not in the course of the party's business, and of which it is usual to take other proof or evidence of sale. * * *

The person who made the entry was himself a witness in the cause and testified * * *. That testimony was competent and was primary. Its importance depended upon its character and the credibility of the witness. But its competency does not depend in the least degree upon the fact that he made a written entry or memorandum of the transaction at the time. He could testify directly and in person to any fact he entered on the books and that testimony would be the original, primary and therefore only legal evidence of the fact in question." (R. 61.)

The following additional authorities are cited by the Chief Justice of the Court of Appeals in his opinion in the pending case.

Vicksburg & Meridian R. R. vs. O'Brien, 119 U. S. 99.

Sechrist vs. Atkinson, 31 App. D. C. 1.

Gurley vs. MacLennan, 17 App. D. C. 170.
Rudd vs. Buxton, 41 App. D. C. 35, 38.

II.

The Objections to the Hypothetical Question Were Properly Overruled.

The hypothetical question which the court permitted Dr. Gill to answer begins on page 25 of the record and was framed so that it specifically excluded what the patient had told him, and was based solely upon his own examination of her condition, assuming the truth of the facts stated in the hypothetical question.

The effort of defendant to draw hair-splitting distinctions in the language used in the question is futile as the question substantially conveyed to the witness an assumption of facts complete and supported by the testimony.

Every doctor who testified conceded that if disease, and not a tissue destroying acid, caused the perforated ear drums, the perforation would have resulted from an abscess that formed as a result of the disease or infection, and that on rupturing, perforated the ear drum. In such case the abscess would usually be attended with pain and always followed by the discharge of pus (R. 23); so that no matter what the nature of the disease, whether of childhood or later age, and whether measles, scarlet fever, catarrh, syphilis, tuberculosis, infected teeth, nose or throat, or otherwise, the ear drum perforation, if from disease, would be preceded by symptoms localized in the ear, and if severe enough an abscess would form, which on breaking would discharge pus, and leave the ear drum perforated. (R. 29.)

The testimony offered on behalf of the plaintiff es-

tablished beyond question that she never suffered from any abscess, pain, or discharge from the ear, and the jury had the right to infer from this testimony that her ear drums had not been perforated by infection or disease prior to the time Dr. Gunning treated her.

The hypothetical question assumed that at no time did she have any abscesses of the ear or discharge of the ear that resulted in the discharge of pus. Defendant contends on page 24 of his brief that Dr. Gill's testimony limited the diseases which affected the ear drums and would cause a discharge in the ear, to the acute diseases of childhood. Dr. Gill also testified without such limitation that, "In the event that a disease should cause the destruction of the ear drums it would usually be followed by a discharge from the ear and pain before the ear rupture. (R. 23.)

All of the other expert witnesses corroborated Dr. Gill to the effect that whenever the perforated ear drum resulted from disease, it would be because the infection localized in the ear drums sufficiently to form an abscess. (R. 35.)

To the objection that the witness took into consideration the examination he made in answering the question, this he had a right to do, inasmuch as he detailed to the jury what he found on that examination in prefacing his answer to the hypothetical question.

The final objection to the answer, is that it was a guess on the part of the witness, because on cross-examination he testified that when he first examined the planitiff he did not reach a conclusion or diagnosis at that time as to the cause of her trouble, and that he had not yet reached a conclusion in his own mind as to the cause of her trouble. (R. 28.) As the trial court stated in overruling this objection, the witness con-

veyed the meaning that he had not reached any conclusion as to the cause of her condition, *solely from his examination;* but his opinion, in answer to the hypothetical question, was based *not merely upon his examination,* but also upon the facts that he was asked to assume in that question, the truth of which facts it was not for him to know or determine. (R. 30.)

The language of the trial court on this point is as follows:

> The Court: I think the motion will have to be overruled. I followed the doctor's testimony pretty closely and my view of this testimony was that he did not, in answering the hypothetical question, add to it any facts that he was not asked to assume in it. With respect to the last stated ground, not having formed any conclusions in his own mind as to the cause, I understand his testimony to be that he had not formed any conclusions in his own mind as the result of his examination; that opinion is expressed in the answer to the hypothetical question which was an opinion based entirely upon facts that he was asked to assume in that question. For that reason I overrule the motion, to which ruling the defendant duly noted an exception.

The specific objections now made to the hypothetical question were not raised in the trial court, but merely the general objections that the question was irrelevant and immaterial. (R. 26.)

The refusal of the court to strike out the answer after the cross-examination was also proper, because it was apparent that the doctor did not guess and as the trial court said (R. 30) his answer to Mr. Gatley was merely to the effect that he had no personal knowledge as to the real cause, but was merely testifying as an expert upon assumed facts.

The weight of his testimony and its credibility was for the jury.

In the language of the majority opinion of the Court of Appeals, in considering this assignment of error, the Court of Appeals said (Rec. 77-78)

> "Other assignments of error are presented by Appellant, among them the charge that the lower court erred in permitting plaintiff's expert witness to answer the hypothetical question put to him by plaintiff's counsel. We find no error in this ruling, for the question called for an answer based on both the personal knowledge of the witness, acquired by his examination of plaintiff, and upon assumptions such as were supported by evidence already introduced in behalf of plaintiff."

III.

The Witness Smith was Properly Permitted to Impeach Doctor Allen.

The foundation for impeaching Doctor Allen was laid on his cross-examination (R. 34). He was asked on direct examination as to an examination he had made of plaintiff, and it was proper on cross-examination to bring out the details as to who were present when he made that examination and the circumstances under which he made it. This was not collateral but directly a part of the same examination about which he testified in chief. The foundation to impeach him was laid without objection. (R. 34.) He contradicted by his testimony what he was heard to say as part of his findings at the time he made the very examination he was testifying about.

The record shows that the trial court limited this impeachment and admitted the testimony of the wit-

ness Smith, not for the purpose of establishing the fact as to what condition her ear drums were in then, but merely for the purpose of contradicting Allen, and the testimony was only admitted for that purpose. (R. 58-9.)

IV.

The Court Did Not Err in Refusing Defendant's Instruction No. 3.

This instruction was fully and fairly covered by the Court in its general charge and the prayer itself was objectionable as an abstract statement and misleading in that it required the plaintiff to establish that she sustained all the injuries complained of in the declaration and not merely any of them, and did not limit the proof to the negligence charged in the declaration. The substance of this instruction was so thoroughly covered in the trial court's charge (R. 71) that defendant was not prejudiced by the denial of this prayer, and cannot complain of error in the denial of the instruction.

Presby vs. Thomas, 1 App. D. C. 171.

V.

The Court's Charge was Without Error.

The trial court plainly told the jury that there were two issues on the question of liability; one, the statute of limitations, and the other, negligence.

The trial court did not tell the jury that what the doctor put in her ear was the crux of the case, but merely that it was the crux of the case "on the question of alleged negligence" (R. 69), which was the sec-

ond issue for the jury to decide, the first being the plea of the statute of limitations.

Whether or not the doctor put a harmful solution in her ear was the crux of the case on the question of negligence, because that is the negligence that was charged.

The court carefully covered both issues in its charge. (R. 64, 65, 69.)

Every argument on the facts that appears in the defendant's brief was made to the jury, who by their verdict found the facts in favor of the plaintiff.

VI.

The Trial Court Properly Overruled the Motion for a Directed Verdict.

Under the evidence in this case the court properly submitted the issues to the jury to determine the facts.

It was, or should have been, peculiarly within the knowledge of defendant what he had put in plaintiff's ears. She could only know by the effect upon her. She testified that:

> "The very minute it went in the pain was horrible and I became dizzy, the room started going around and around. I held on to the arms of the chair and I told him: 'Something has happened, you can't realize what you have done.' He said: 'Oh, nothing is wrong, I assure you nothing is wrong.' I said: 'You can't realize what the noise is that I hear in my head and the dizziness and this room is going around.' He said: 'There is absolutely nothing wrong, let me put some in your left ear,' and he did, and as he did I felt the same sensation and I struck his arm away. It was terrible. No one knows what I went through. And he knew something had happened, he acted like

he was wild; he did not know what to do for me and I was begging him to do something for me and he just couldn't do a thing. He said it would be all right. I heard a roaring noise. I don't know whether it was cannon shots or gun shots or what, but the noises were terrible. I could not describe to anyone what they were. Immediately I became ill. I really lost control of my whole body. I didn't have any feeling and it seems that the doctor must have laid me on the table and that is about all I can remember except the noises in my head. I believe I do remember arriving home and seeing my mother that evening, but I could not tell you how I got there." (R. 19.)

On the other hand, the defendant testified that the liquid he inserted in her ears had a directly contrary effect on her; that it immediately relieved her. "She became partly composed so she could answer my questions. The oil relieved her pain and her dizziness." (R. 55.)

The evidence in the case not only established the negligence charged but fairly proved that her condition resulted from that negligence and not from any prior disease or infection. To determine these facts the jury was not required to conjecture or guess but had the evidence before it to find the facts.

The trial court expressly told the jury that their verdict must be based upon the evidence (R. 63, 66, 67) and granted defendant's prayer No. 4 to that effect (R. 68).

The cases cited by defendant have no application to the facts of this case. On the contrary there is a line of well considered cases against physicians which do apply, and which are to the effect that under circumstances such as are detailed in this case, the questions

of fact are for the jury, holding to the extent that expert testimony in such a case is merely advisory and in many instances not even required.

In Coffey vs. Tiffany (Mo. 1914) 182 S. W. 495, the action was against an oculist for blinding plaintiff's eye by administering the wrong medicine. In that case there was no expert testimony offered on behalf of the plaintiff, but the court held that it was not necessary where the claim was that he administered the wrong kind of medicine, and not that he erred in judgment; for in such case expert testimony as to the cause of an accident is merely advisory. It was further held that where a medicine produced blindness it was not necessary to show the particular nature of the medicine as that was peculiarly within the knowledge of the defendant upon whom the plaintiff relied as her physician.

In Wood vs. Vroman, 184 N. W. 520, 524, 198 N. W. 228, 229 (Mich. 1921) it was held in an action to recover damages for loss of an eye that it was for the jury to determine whether it was negligent to wipe pus from an ulcer on the patient's lower lid when there was an open sore on the eyeball.

It was also held that it was not required that the plaintiff prove malpractice to an absolute certainty, but merely to establish facts from which such an inference might fairly be drawn by the jury. In that case the defendant denied that he had found or opened an ulcer and insisted that the loss of the eye was due to an infection carried by particles of dust on the hands of the plaintiff and workmen in an effort to remove a piece of steel from his eye.

Marx vs. Scaultz, (Mich.) 175 N. W. 182, was an action against a druggist for causing death by putting

a mis-direction on the label prescribing a teaspoonful instead of three drops of a form of arsenic. The dose was taken November 30th and the patient did not die until February 7th following. It was held that a doctor's testimony as to the effect of arsenic, was sufficient evidence to submit the issue to the jury.

Loveland vs. Nelson, (Mich. 1926) 209 N. W. 835, was a case in which a wisdom tooth was extracted and it was claimed that lysol was put on the needle.

In James vs. Robertson (Utah 1911) 117 Pacific 1068, it was claimed that the doctor negligently permitted carbolic acid to come in contact with the cornea of the patient's eye after removing a cyst, and the defense was that no acid entered the eye, but the condition was due to other causes. It was held that the jury should decide the issue.

Grubbs vs. Elrod (Georgia 1922) 112 S. E. 379, held that the question of negligence was for the jury and to the same effect was Hunter vs. Burrough (Virginia) 96 S. E. 360.

In Eichholtz vs. Poe (Mo. 1920) 217 S. W. 282, where it was claimed that a doctor negligently caused a patient, while in a weak condition after the removal of a kidney, to have a tooth pulled, breaking his jaw bone and causing infection, it was claimed there was no proof of negligence or of casual connection between the act done and the injury suffered, but the court held that the issues were properly submitted to the jury, and that negligence in such case may be shown by circumstantial evidence and the inferences legitimately drawn from physical facts.

Laughlin vs. Christensen, 1 Fed. (2nd) 215, decided by the Federal Circuit Court of Appeals in 1924, was an action for damages for malpractice, the negligence

charged being that the surgeon left a gauze sponge in the abdominal cavity of a patient after an operation. The court held that it was proper to submit the issue of negligence to the jury and that in such a case expert testimony was not indispensable.

> "It is true that there is a large class of malpractice cases in which the question or matter under investigation is so intricate and abstruse, or so little understood, that ordinary jurors would in all probability, know nothing about the same, but must be guided by opinions of witnesses having special knowledge. In this class of cases the plaintiff fails to make a case for the jury in the absence of testimony of a properly qualified expert witness. * * *
>
> "Furthermore, it is not a universal rule, even when the alleged negligence of medical men is under consideration, that testimony by experts is indispensable."

In Vergeldt vs. Hartzell, 1 Fed. (2nd) 633, the action was against a dentist who in operating on plaintiff's teeth with an electric drill, permitted it to slip, lacerating her tongue and mouth. It was held that where the question in issue is not one of skill in treatment, or the performance of an operation, but of plain negligence and failure to use proper care, as to which a layman is as competent to judge as another physician or surgeon, it is not one which must be determined solely by the testimony of experts.

VII.

The Opinion and Judgment of the Court of Appeals.

Mr. Chief Justice Martin in delivering the majority opinion of the Court of Appeals in this case (R.

76) reviews the authorities of this court as well as of the Court of Appeals of the District of Columbia, which uniformly establish the principle that where there is uncertainity from the evidence as to the existence of negligence, the question is not one of law but of fact and to be settled by a jury; and this, whether the uncertainty arises from conflict in the testimony, or because the facts being disputed, fair minded men will honestly draw different conclusions from them, and it is only when but one reasonable view can be taken of the evidence and of its every intendment, and that view is utterly opposed to the plaintiff's right to recover, that the court is justified in withdrawing the issues of fact from the jury.

Richmond and Danville Railroad vs. Powers, 149 U. S. 43, 45.
Texas etc. Ry. Co. vs. Harvey, 228 U. S. 324; 57 L. Ed. 856.
Davidson Steamship Co. vs. U. S., 205 U. S. 192; 51 L. Ed. 767.
McDermott vs. Severe, 202 U. S. 604; 50 L. Ed. 1166.
Marande vs. Texas & Pac. R. R. Co., 184 U. S. 191; 46 L. Ed. 496.
Supreme Lodge K of P. vs. Beck, 181 U. S. 52; 45 L. Ed. 745.
Robertson vs. Wash. Ry. & Elec. Co., 279 Fed. 183.

It has never been contended by plaintiff that the issues should have been submitted to the jury because a scintilla of evidence was introduced, and the authorities cited by defendant to the effect that the scintilla rule is not the test, are not in point because the lower court in this case found substantial evidence in support of the plaintiff's claim, although there was a

sharp conflict of fact. Defendant admits in his brief that where there is any substantial conflict in testimony, the matter must be submitted to the jury, but contends that, in this case, there was no substantial conflict with respect to any substantial issue.

Let us, therefore, briefly consider a few of the outstanding substantial conflicts in testimony with respect to the substantial issues.

The defendant's own testimony as to what occurred was at variance with the testimony of nearly every other witness in the case, including his own expert. For example, he testified that when he inserted the liquid in plaintiff's ears it soothed and quieted her, whereas she testified that was when she experienced the terrible agony.

The defendant testified that he diagnosed the cause of the condition as "a Menieré's difficulty, which is a disturbance of the internal ear." (R. 54-55.) The fact that her eighth nerve (which is the nerve of hearing, and which transmits the sound) was normal proved that the inner ear was "perfectly allright," that there was no disease of the inner ear. (R. 27) This eliminates the theory of the defendant that an attack of Menieré's disease (a disease of the internal ear), caused her illness and perforated ear drums.

His expert witness, Dr. McJ. Allen, who examined plaintiff November 24, 1925, at Dr. Patten's office on behalf of and at the request of defendant's counsel, and in the presence of her then attending physician, Dr. Patten, testified that "I formed a conclusion that the cause of the condition of the drum of her ears was probably acute otitis media, early childhood, possibly later in life, probably early childhood" (R. 32-33) and that it was due probably to poor ventilation of the

nose and focal infection, most probably the teeth, and that the rupture of the ear drums would result in such a case because as a result of the inflamation an abscess forms and ruptures through the drum, through which the pus finally ruptures. (R. 33) The history of plaintiff's physical condition from childhood, however, as testified to by numerous witnesses, proved that she never had abscessed or running ears or any deafness whatsoever prior to the injury inflicted by the defendant in this case. (R. 15-18.) Moreover, on cross-examination, Dr. McJ. Allen testified that otitis media is a disease of the middle ear (R. 36) and not of the internal ear as is Menieré's disease. Asked if from his examination and history of the case her condition in his opinion was due to Menieré's disease, he answered, "I did not say that. I do not believe I said that." (R. 40-41.)

Miss Spitzer, referred to in the dissenting opinion as a "disinterested witness", was contradicted in various important particulars. She claimed that she was in the defendant's office on October 20th and offered a receipt from the doctor which she says she obtained on that date, and which was so dated. Assuming that she was there on that date, the plaintiff's testimony, corroborated by numerous witnesses who had occasion to remember the date in connection with birthdays in their immediate families, was to the effect that plaintiff was injured on Wednesday, October 25th, five days later. Miss Spitzer does not claim she ever saw the plaintiff except on the one occasion at the doctor's office, until confronted in court nearly five years later and admitted that the occurrence was never called to her attention from 1922 until years later (R. 42); that she was a friend of Mr. and Mrs. Gunning

as well as a patient and knew them very well for sixteen or seventeen years, and saw them frequently. (R. 42) She could not remember how many times or whom she had seen in his office on other occasions, but remembered that on that occasion she had paid the doctor $50. and taken his receipt for that amount, but when shown the receipt she herself had produced it was for $14. instead of $50. and she attempted to explain this by saying "I have one for $50. I thought probably that was it. I don't know how much he charged me for a treatment or visit." (R. 42)

She further testified that the plaintiff was in the doctor's private office only about fifteen minutes, and that no one came into the office while she was there; that she heard no screams and that she saw plaintiff come out of the doctor's room and be assisted into the doctor's bedroom by the doctor. (R. 42)

As to this important fact she was flatly contradicted by plaintiff's witness Brooks C. Easterling, sergeant of the United States Marine Corps, who testified that he had an appointment to meet plaintiff at six or six-thirty p.m. in front of the doctor's office on the day of her injury; that he waited 15 or 20 minutes beyond the time and when she did not come out he went in and then testified:

> "As I got to the door of the doctor's office I heard a scream and at the same time someone came and opened the door and the doctor came to the door and asked me if I was the one that was there for this lady. I told him I was, so he invited me in and I went into his office, where she was lying on a couch, apparently in a semiconscious condition. I asked her what the trouble was and she did not seem to understand me and I asked the doctor what was the trouble, or what

he had done to make that effect, and he said, nothing, that he had just given her a small treatment of oil and she had suffered a slight shock and would be alright shortly. About ten minutes later I asked her how she felt and the only answer I got was "My head, my head.' She remained on the couch possibly an hour when I suggested she be taken off the couch and placed in a more comfortable place and she was taken over to the doctor's bedroom and placed in bed. She was helpless. She had to be picked up bodily. I picked her up, carried her over and placed her in the bed and she was still groaning and moaning with her head; she could not balance herself, she could not walk. She remained there until about 11 o'clock that night, was not much better and was still unable to walk, so I called a taxi, picked her up, carried her down to the taxi and took her home. She was helpless when we got her home. She was taken out of the taxi into the house by the chauffeur, who carried her, and she was placed in bed. I think I have seen her once since then, with the exception of the time that I saw her in her attorney's office. I met her on the street once. She was complaining of her ears, of being deaf in one ear."

Sergeant Easterling was not impeached in any way and was certainly a more disinterested witness than the witness Spitzer and he testified that he had carried the plaintiff bodily from the doctor's office to the doctor's bedroom; yet the witness Spitzer testified that she saw the plaintiff walk assisted by the doctor from the office to the bedroom. This also flatly contradicted the doctor's wife, Mrs. Gunning, who testified that "when she came out of the office she walked to the bedroom." (R. 45)

Defendant argues that plaintiff's expert, Dr. Gill,

testified that he had reached no conclusion as to the cause of her trouble, even assuming that the facts in the hypothetical question were true and considering all the knowledge that he had gained from his examination, but this assertion is contrary to the record and the trial court's understanding of the testimony.

The witness testified, "I understand the question to ask if he made a diagnosis of the cause of her trouble (at the time of his examination); he has not reached a conclusion in his own mind yet." (R. 28) In answering the hypothetical question, he assumed that in October, 1922, no focus of infection here discussed then existed. (R. 29)

The trial court in overruling the motion to strike out the doctor's testimony on this ground said, "With respect to the last stated ground, not having formed any conclusions in his own mind as to the cause, I understand his testimony to be that he had not formed any conclusions in his own mind as the result of his examination; that opinion is expressed in the answer to the hypothetical question which was an opinion based entirely upon facts that he was asked to assume in that question."

In the majority opinion in the Court of Appeals in disposing of the same objection, the court said, "The evidence furthermore tends to show that in February, 1927, plaintiff's ears were examined by a specialist who found that the ear drum of the right ear was practically all gone and that of the left ear from one-third to one-half gone, and that the tissues were scarred. The specialist testified that various diseases or injuries might cause such a condition, or that it might be caused by the injection of some destructive substance into the ears, and that he was unable to state

from his examination the cause of plaintiff's condition, but in answer to a hypothetical question based upon his examination together with the evidence submitted on behalf of plaintiff he gave his opinion as follows: "Why, she had to have something in there to destroy the ear drums. They were destroyed. My opinion is that they were destroyed by something that was put in the ear."

It is therefore quite evident that plaintiff's expert as shown by the record did not testify that, "in the light of all the facts before him and assumed by him as hereinbefore shown" he was unable to reach a conclusion as to the cause of her injury, but he testified that assuming the facts in the hypothetical question to be true and taking those assumed facts together with his own examination, his opinion was that the ear drums "were destroyed by something that was put in the ear." (R. 26)

Nor was the jury, as argued by counsel for the defendant, required to guess or base their conclusion on speculation, because if they believed Dr. Gill's testimony as to his examination and believed the facts to be true that were shown by the testimony of the other witnesses as to her previous healthy and normal condition, which facts were assumed by Dr. Gill in answering the hypothetical question, then the jury had the testimony before it that her ear drums must have been burned by a tissue-destroying acid, the exact nature of which could only have been known to the defendant.

With respect to the argument commencing on page 36 of defendant's brief that all expert witnesses said there were many causes for the perforation of an ear

drum other than those claimed by the plaintiff, yet, the fact remains that every other possible cause was negatived by the testimony of plaintiff's witnesses, because if the perforated ear drums had resulted from any other cause than the acid, namely, from disease or infection it could only have been because an abscess had formed and broken, rupturing the ear drums and discharging pus through the ear. The plaintiff and her witnesses all offered testimony which disproved that she had ever had such a condition. Consequently, the defendant is arguing in disregard of the evidence, the weight and credibility of which was essentially for the jury.

Defendant contended that if an acid had been put in her ear it would have scarred the external canals, but the evidence disclosed that if the dropper had been inserted in the ear far enough, the acid would not have touched the outer canal but would only have burned the drum as in this case. "If a dropper is inserted into the ear far enough, until it is about to touch the drum, and strikes the drum and none of the acid strikes the parts before you get to the drum, it would not cause any burn to the outer canal." (R. 29)

Can it be successfully contended that the court and not the jury should have determined the issues when the testimony offered by the plaintiff tended to establish that plaintiff had never had a diseased or abscessed ear or any deafness, that immediately when the liquid was inserted in her ears, she suffered the sensations and was in the physical condition described by her witnesses, that for four years thereafter, she continuously had medical treatment to relieve this ailment,

and that according to expert testimony, if it were true as testified by her witnesses, that she had no prior infection or disease that had abscessed and ruptured her ear drums and she experienced the sensations described by her immediately following the insertion of the liquid in her ears, then the condition of her ear drums was the result of something that was put in the ear that destroyed the ear drums? (R. 26-75)

The opinion of Mr. Justice Van Orsdel, in which he criticises but adopts the established principle by which issues of fact should be submitted to the jury, does not lessen the fact that in his judgment there was "sufficient evidence to carry this case to the jury."

While it is not incumbent upon counsel to argue for or against any modification in this well established principle, it would certainly tend to oust a jury from its proper judicial function to that of "a mere automaton" to adopt a rule whereby the trial justice, who believes there is a substantial conflict as to substantial issues, is still left the broad discretion to decide whether the evidence raises a "reasonable" issue of fact.

The trial judge has his function of reviewing the verdict and setting it aside if upon due reflection he feels that it is contrary to the evidence or not supported thereby, and in this case the trial court made that review upon his consideration of the motion for a new trial that was filed herein, and with full knowledge of all of the testimony and having had the opportunity to observe the actual trial and to see and hear the witnesses as they testified, he sustained the verdict and sustained his original ruling in submitting the case to the jury.

It would be a dangerous precedent, striking at the very foundation of the jury system, if these well settled principles of law are to be uprooted. This court has uniformly held that the determination of the jury, approved by the trial court and by the Circuit Court of Appeals respecting negligence, if there is any evidence upon which it can be raised, cannot be disturbed by the Supreme Court.

As this court said in the case of Davidson Steamship Company, U. S. 205 U. S. 192, 195; 51 L. Ed. 767: "We could not set aside the verdict of the jury approved as it was by the trial court and the Court of Appeals without ourselves exercising the function of the triers of fact when under the law, such questions are committed to the determination of a jury."

The well defined duties of the court and jury respectively, do not require the citation of authorities nor is there reason to dispute the principles announced in the cases cited by defendant on this question, but the application of those principles to the facts of this case show that this was a jury question.

The mere fact that a Justice of the Court of Appeals would have reached a different conclusion upon the same state of facts and would have given more credence to the testimony of some witnesses and less credence to witnesses that the jury, who saw them, believed, is no reason in law or logic for disturbing the verdict, if we are to be guided by legal principles. Indeed a grave injustice would be done in this case to the plaintiff if the rule were otherwise.

As this Court said in the case of Hickman vs. Jones, 9 Wall. 197, 201; 19 Law Ed. 553:

> "In this case the evidence was received without objection, and was before the jury. It tended

to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it in full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law."

Texas and P. R. Co. vs. Gentry, 163 U. S. 353; 41 Law Ed. 350.

R. R. Co. vs. Ives, 144 U. S. 408; 36 Law Ed. 485.

Texas and P. R. Co. vs. Carlin, 189 U. S. 354; 47 Law Ed. 849.

Maraude vs. Texas & P. R. Co., 184 U. S. 173, 183; 46 Law Ed. 487.

Charter Oak Ins. Co. vs. Rodel, 95 U. S. 232; 24 Law Ed. 433.

Barney vs. Scheimer, 9 Wall 248, 19 Law Ed. 648.

New Jersey R. Co. vs. Pollard, 22 Wall 341; 22 Law Ed. 877.

Moulor vs. American Life Ins. Co., 101 U. S. 708; 25 Law Ed. 1077.

Weightman vs. Washington, 1 Black 39; 17 Law Ed. 52.

Richardson vs. Boston, 19 How. 263; 15 Law Ed. 639.

CONCLUSION.

A careful consideration of the complete record of testimony in this case will establish that the issues of fact were peculiarly within the province of the jury and were submitted to the jury under correct and fair instructions as to the law, that no error was committed in the trial of this case, and that the judgment should be affirmed.

ALVIN L. NEWMYER,
RALPH A. CUSICK,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1929.

Edward J. Gunning, Petitioner, *vs.* Gertrude L. Cooley.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[March 12, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent brought this action in the supreme court of the District of Columbia to recover damages from petitioner, a practicing physician, for injuries claimed to have been caused by his negligence while treating her. Her complaint is that he put into her ears some tissue-destroying liquid, which for brevity we shall refer to as acid, and thereby injured the drums and other parts of her ears. The jury returned a verdict for the plaintiff and the judgment thereon was affirmed in the Court of Appeals. 30 F. (2d) 467.

At the close of all the evidence defendant moved the court to direct the jury to return a verdict in his favor. He maintained that the evidence failed to show that plaintiff was injured by the negligence alleged and that it left the cause of her injury in the realm of conjecture. The motion was denied. Defendant sought reversal on that ground. And that is the only ruling of which complaint was made in the petition for this writ.

An opinion written by the Chief Justice of the Court of Appeals held that the motion accepted as true plaintiff's evidence together with all inferences reasonably deducible from it, and that the motion could be granted only when all reasonable men could "draw but one conclusion from it, and that conclusion utterly opposed to plaintiff's right to recover". He cited *Railroad Co.* v. *Carrington*, 3 App. D. C. 101, 108; *Warthen* v. *Hammond*, 5 App. D. C. 167, 173; *Adams* v. *Railroad Co.*, 9 App. D. C. 26, 30; *Glaria* v. *Washington Southern R. Co.*, 30 App. D. C. 559, 563; *Catholic University* v. *Waggaman*, 32 App. D. C. 307, 320, and *Chesapeake Beach R. Co.* v. *Brez*, 39 App. D. C. 58, 69.

There was a concurring opinion by one of the associate justices and dissent by the other. The concurring justice held that under

the strict rule adopted in that court there was sufficient evidence to carry the case to the jury. He said (p. 470): "It is a mere travesty to say that the court is bound to send the case to the jury, if there is any evidence tending to support the contention of the plaintiff, and shut its eyes to the justice or injustice of a verdict resting upon such a flimsy basis. It is my fixed opinion, as expressed on many occasions, that the rule established in the decisions referred to, and in many other decisions of this court, is too strict, and should be modified to the extent of confiding in the court the power to determine whether or not the evidence is sufficient to raise a reasonable issue of fact, capable of supporting a verdict that will meet the substantial ends of justice. I trust that such a rule of procedure may yet be adopted by the unanimous concurrence of the justices of this court, as will lift the trial justice in this District from a mere automaton to the exercise of his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure as will elicit verdicts based upon substantial issues of fact rather than mere caprice and sympathy". The dissenting justice found in the evidence "no basis whatever for the verdict and judgment".

"When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 369.*

*And see Phoenix Ins. Co. *v.* Doster, 106 U. S. 30, 32. Montclair *v.* Dana, 107 U. S. 162-163. People's Savings Bank *v.* Bates, 120 U. S. 556, 561-562. North Penn. Railroad *v.* Commercial Bank, 123 U. S. 727, 733. Kane *v.* Northern Central Railway, 128 U. S. 91, 94. Delaware, &c. Railroad *v.* Converse, 139 U. S. 469, 472. Elliott *v.* Chicago, Milwaukee, &c. Railway, 150 U. S. 245. Union Pacific Ry. Co. *v.* McDonald, 152 U. S. 262, 283. McGuire *v.* Blount, 199 U. S. 142, 148. Empire State Cattle Co. *v.* Atchison Ry. Co., 210 U. S. 1, 10. Delk *v.* St. Louis & San Francisco R. R., 220 U. S. 580, 587. Baltimore & Ohio R. R. Co. *v.* Groeger, 266 U. S. 521, 524. Chicago, M. & St. P. Ry. Co. *v.* Coogan, 271 U. S. 472, 478. St. Louis-San Francisco Ry. *v.* Mills, 271 U. S. 344, 347-348. New York Central R. R. Co. *v.* Ambrose, — U. S. —.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed". *Improvement Company* v. *Munson*, 14 Wall. 442, 448. *Pleasants* v. *Fant*, 22 Wall. 116, 122.

Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593, 606. *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349, 360. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524, 527. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43, 45.

Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. *People's Saving Bank* v. *Bates*, 120 U. S. 556, 562. *Southern Pacific Company* v. *Pool*, 160 U. S. 438, 440. "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither." *Ewing* v. *Goode*, (by Taft, Circuit Judge), 78 Fed. 442, 444. See *Patton* v. *Texas and Pacific Railway Co.*, 179 U. S. 658, 663. *New York Central R. R. Co.* v. *Ambrose*, — U. S. —.

The burden was on plaintiff to establish the negligence and injury alleged; and, if the evidence failed adequately to support either element, defendant's motion should have been granted. We need not consider whether the opinion written by the Chief Justice

could be sustained if it stood alone. The concurrence was essential to the judgment. The concurring opinion rests upon the conception that the rule stated by the Chief Justice required denial of defendant's motion if plaintiff's claims were supported by any evidence, however slight. That is not the rule applied in federal courts. But it does not follow that a verdict should have been directed for the defendant. It remains to be considered whether, having regard to the applicable rules established by the decisions of this court, the evidence was sufficient to warrant a finding by the jury that defendant was negligent as charged and thereby injured plaintiff.

It is not claimed by plaintiff that defendant knowingly put acid in her ears, but that he negligently did so while intending to apply oil. She gave testimony that tends to show the following facts. Prior to defendant's treatment her hearing was good and she never had any disease or injury in or about either ear. She first consulted defendant on Saturday, October 21, 1922. He treated her throat. On the following Monday defendant told her that there was something wrong with her nose and that mouth breathing had made her throat sore. He treated her nose. On Wednesday she told defendant she had some cold and felt wax or something in her right ear. He examined it and said there was nothing wrong. She repeated that she felt wax in it. He then said that he would put some mineral oil in her ears. There were several small white bottles and a dropper on a cabinet in his office. He took the dropper from one of the bottles and put some liquid in her right ear. She immediately suffered much pain, became dizzy and heard great noises in that ear. He then put some of the liquid in her left ear. She experienced the same sensations, became very ill and lost control of her body. Other evidence shows that she went or was taken to a bed in defendant's house and there remained for some hours and until a friend came and took her to her mother's home.

There was testimony given by plaintiff's mother and sister that, up to the time defendant treated her ears, plaintiff's hearing was good; that she never had any disease or injury of the ears; that, when she was brought from defendant's office, she was very ill, apparently suffered much pain, remained in bed for about two days and was deaf. On the Friday following defendant's last

treatment she was taken to Doctor Patten, a specialist. He treated her daily for some months and two or three times a week until October, 1926. Then Doctor Morgan treated her twice a week until the time of the trial. Neither Doctor Patten nor Doctor Morgan testified at the trial. The record shows that the former could not be called, but it is silent as to the latter.

In 1923 Doctor Crisp, treating her for something else, casually examined her ears. He found the drum of the right ear broken and that of the left ear inflamed. In 1925, after the commencement of this action, at the request of the defendant, Doctor Allen was permitted to examine the plaintiff. He found both eardrums retracted and a perforation in the right but none in the left. Early in 1927, in preparation for the trial, plaintiff had Doctor Gill examine her ears. He found practically all of the right and about half of the left drum gone and that she had one-third hearing in the right and two-fifths in the left ear. He gave testimony to the effect that, if applied to them, acid would injure or destroy eardrums and would cause pain and possibly other sensations like those which plaintiff testified she suffered at the time of the treatment.

Defendant testified plaintiff told him her hearing had become impaired and that her ears had been treated. He found both eardrums perforated. On her last visit she was nauseated and complained of dizziness and roaring in her head. He dropped mineral oil into her ears with a dropper to close up the external ears in order to prevent noise from penetrating into the middle ears. The noise subsided, she became composed, went to a bed in his house and remained until taken home by a friend. He denied that he put acid in her ears and testified that he never had any in his office.

The evidence shows that, while difficult to do, it would be possible by means of a dropper to apply acid to eardrums without allowing it to come into contact with other tissues. There was no scar or anything to indicate that acid had touched any part of the canal leading to either eardrum. Plainly it would have been impossible for defendant to have closed the external ears without allowing the liquid used for that purpose to touch the canal tissue. But plaintiff was not required specifically to show what defendant did put in her ear or that the treatment destroyed either of her eardrums or made her deaf. If the evidence was sufficient

to justify a finding that defendant negligently put a harmful fluid in her ears causing her pain and injury, the motion was properly denied.

As the credibility of witnesses and the weight to be given to their testimony are for the jury, plaintiff's testimony as to the treatment and immediate effect upon her and the testimony of others as to her condition shortly afterwards constituted sufficient evidence to warrant a finding that instead of oil defendant negligently put some harmful liquid into her ears thereby causing her pain, suffering and some injury in and about her ears. It was not necessary for the trial court in passing upon the motion to determine, and we need not consider, whether under the rules laid down in the decisions of this court the evidence was sufficient to warrant a finding that the perforation of either eardrum or permanent deafness resulted from defendant's treatment.

Defendant seeks reversal on a number of grounds that were not mentioned in his petition for the writ. But this court is not called on to consider any question not raised by the petition. *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464.

Judgment affirmed.

The CHIEF Justice took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.